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NOTES.

MR. GEORGE H. SMITH of Los Angeles, California, has done me the honour of devoting an article in the American Law Review to my introductory chapter on 'The Nature and Meaning of Law,' published in this REVIEW last July, and expressing regret that I have not solemnly recanted the errors of the Austinian school and undertaken an express refutation of them. As to the first point, I have nothing to recant. More than twenty years ago I published an article against the Austinian definition of law: it was naturally not what I should write now, and therefore I purposely do not give the reference to it, but I still regard it as nothing worse than immature. As to the second point, the best way of refuting an erroneous system is to show that one can do better without it. Again, although I cannot accept Austin's philosophy of law, yet I consider him entitled to an honourable place in the history of the science of politics, for the reasons I have stated in my little book on that subject. Mr. Smith seems to think there is such a thing as a generally accepted doctrine of the Law of Nature, and that it is fairly well settled and easily known. My own reading of modern jurists and philosophers has not exactly led me to that conclusion. F. P.

No principle of private international law as understood in England is better established than that, to use the words of Mr. Westlake, 'all questions concerning the property in immoveables, including the forms of conveying them, are decided by the *lex situs*.'

Yet the two recent decisions—*In re Piercy*, '95, 1 Ch. 83, 64 L. J. Ch. 249, and *Mayor of Canterbury* v. *Wyburn*, '95, A. C. 89; 11 R. Feb. 89—throw doubt, not on the principle itself, but on the extent of its application.

1. *T*, an English testator domiciled in England, leaves land in Italy to English trustees upon trust for sale and conversion, and to hold the same until conversion, and the proceeds of the sale

after conversion upon certain trusts (*inter alia*) for his children during their respective lives, with remainders to their respective issue. These trusts are to a great extent invalid under Italian law as regards land in Italy (see *Codice Civile*, Arts. 8, 9, 12, 899, 900), which indeed apparently aims at the abolition or non-recognition of all trusts. The trustees under *T*'s will have sold part of the lands. It is held by North J. that the trustees are bound to sell the land, that the proceeds of the sale must be held by them upon the trusts declared by the will, but that the rents of the unsold land must devolve according to Italian law. This is the effect of *In re Piercy*; the principle of the decision apparently is that Italian land devolves in accordance with the law of Italy (*lex situs*), but that English trustees of Italian land, if not forbidden to sell it by Italian law, must deal with the proceeds of the land in accordance with the law of England, even if the result is to carry out trusts which the law of Italy does not recognize, or even forbids.

2. *T*, domiciled in Victoria, bequeaths £10,000 to trustees in England on trust to purchase English land for a charitable purpose. It is held by the Privy Council that the bequest of money by a person domiciled out of England for the purchase of land in England is not affected by the Mortmain Acts, 9 Geo. II. c. 36, and 51 & 52 Vict. c. 42, though the trustees in effecting the purpose must comply with all the provisions of English law in respect of such purchases. This is the effect of *Mayor of Canterbury* v. *Wyburn*, which is supposed by the Privy Council to be supported by *Att.-Gen.* v. *Stewart*, 2 Meriv. 143, and not to be inconsistent with the decision of the House of Lords in *Att.-Gen.* v. *Mill*, 2 Dow & Cl. 393. The doctrine of the Privy Council appears in short to be that the Mortmain Acts, as far as they refer to moveables, affect simply the right of bequest, a matter which is governed by the *lex domicilii*, and therefore have in so far no application to the wills of persons domiciled out of England, though all questions regarding the purchase of English land—e.g. with regard to the purposes for which it can be legally purchased, or the persons who are capable of holding it—must be determined in accordance with English law (*lex situs*).

The judgment of the Privy Council in *Mayor of Canterbury* v. *Wyburn* is open to several observations.

First. It is in no degree supported by *Att.-Gen.* v. *Stewart*, which decides that the Mortmain Acts do not extend to lands out of England, and does not decide that the Mortmain Acts do not extend to foreign wills with regard to the purchase of lands in England.

Secondly. The judgment of the Privy Council is opposed to the judgment of the House of Lords in *Att.-Gen.* v. *Mill*, as understood by every writer of authority, including Story, Lord St. Leonards, and Westlake, who has commented upon the case since it was decided in 1831. The contradiction is avoided only by the bold assumption that the Privy Council, more than sixty years after a judgment was given, knows the facts of the case better than did Lord St. Leonards, who was alive at the time when the House of Lords delivered their judgment, and who, to judge from his language, may have been of counsel in the case (see Sugden, Law of Property, p. 419).

Thirdly. The judgment of the Privy Council leads apparently to this result, namely, that a devise by *T* domiciled in Victoria of lands in England for a charitable purpose comes within the Mortmain Acts, but that a bequest by *T* domiciled in Victoria of £10,000 for the purchase of the same lands in England for the same charitable purpose does not come within the Mortmain Acts.

[The learned contributor of this note is one of the few persons thoroughly qualified to criticize the opinion of the Judicial Committee. Still it seems a tenable position that in the early part of this century the *lex situs* got rather more than its fair share, as witness the notable and much discussed case of *Doe* d. *Birtwhistle* v. *Vardill* (9 Bli. N. S. 32, 7 Cl. & F. 895). The present decision is of course not binding on any Court outside the colony of Victoria, but it does not seem likely that a stronger Court can be brought together to reconsider the point in our time, either in the Judicial Committee or in the House of Lords.—F. P.]

North-Western Bank v. *Poynter*, '95, A. C. 56, will convey nothing new to English lawyers, but the decision is useful as establishing a uniform rule for Scottish and English commercial law on a point where there is no rational ground of difference. That a bailor may hold by way of under-bailment for a limited purpose from his own bailee was well settled in England. The contrary decision reversed by the House of Lords appears to have proceeded on a too literal following of general expressions in text-books received in Scotland as authoritative.

Hanfstaengl v. *Baines*, '95, A. C. 20, 64 L. J. Ch. 81, brings us to the end of the 'Living Pictures' litigation. The decision of the Court of Appeal is affirmed on substantially the same grounds, and the House of Lords has most wisely refrained from attempting to lay down any new general rule of law. Questions of 'mixed fact and law' tend sooner or later to produce rules of pure law, but it is important that this should not happen prematurely. All the

trouble about employers' liability has arisen from one or two decisions on particular facts being made the starting-point for a line of rigorous deduction.

Those who are interested in international copyright will observe that the decision in *Fishburn* v. *Hollingshead*, '91, 2 Ch. 371, 60 L. J. Ch. 768, which was much discussed at the time, but not appealed from (see L. Q. R. viii. 1), is now disapproved of by the Court of Appeal: *Haufstaengl* v. *American Tobacco Co.*, '95, 1 Q. B. 347. The result is that the owner of English copyright in a work of art (or, it should seem, any other subject of copyright) produced abroad need not register in England as a condition precedent to suing for an infringement.

The case of the *Corporation of Bradford* v. *Pickles*, '95, 1 Ch. 145, 64 L. J. Ch. 101, C. A., is an important commentary on *Acton* v. *Blundell*, 12 M. & W. 324, and *Chasemore* v. *Richards*, 7 H. L. C. 349. The waterworks belonging to the Corporation of Bradford, which supplied the town, obtained their supply from certain springs adjoining the land of the defendant. The defendant threatened, avowedly for the purpose of drainage, to make tunnels which would intercept the water percolating through his land and the result of which would be to render the springs inadequate if not useless. The plaintiffs alleged, and the Court assumed for the purpose of dealing with the point, that this was done with the object of forcing them to buy the defendant off. It was decided not only that the defendant had a right to make these tunnels, but that his objects and motives were immaterial. The dictum of Lord Wensleydale in *Chasemore* v. *Richards* was approved by the Lords Justices Lindley and A. L. Smith. 'An intent to coerce another to purchase his land even at his own price cannot, it seems to me, be held to be a malicious intent to injure that other. It is in reality an attempt to benefit himself. But even if this were otherwise, such a doctrine has no place in the Common Law of England' (per A. L. Smith L.J., '95, 1 Ch. at p. 166). Lord Herschell did not commit himself so far, only pointing out that the defendant's intention to exercise his legal rights for his own profit could not be called malicious. The result, however, is to throw an almost conclusive weight of opinion into the scale against the Roman and Scottish doctrine that *animus vicino nocendi*, if found as a fact, can make a difference in such cases.

In imperial Rome the young nobles amused themselves by knocking peaceful citizens down in the streets and then tendering them the legal compensation in sesterces. It would, however, be

a misfortune if it were supposed that people in this England of the nineteenth century could break the law because they can afford to pay for the breaking of it. *Shelfer* v. *City of London Electric Lighting Company* ('95, 1 Ch. 287, 64 L. J. Ch. 216, C. A.) is therefore a noble vindication of the right to an injunction. The poor man is not to be compelled to sell his wrong to his rich neighbour, but is it very cynical to suppose that every publican suffering from the vibration of electric light machinery has his price? Has his bar such a *pretium affectionis*? The real advantage of an injunction over a money compensation is that the publican is master of the situation, and can dictate his own terms to the nuisance-maker instead of the damages being assessed by the Court. Still *Fiat justitia.* These tyrannical corporations

> 'do bestride the world
> Like a colossus, and we little men
> Walk under their huge legs.'

Let them learn the law in all subjection.

The Court will not make wills for the people any more than contracts, but in what is known as the cy-près doctrine the Courts have gone a long way in that direction. Theoretically the Courts are consistent. They only purport in the cy-près cases to execute the intention of the testator—a general charitable intention which they discover independent of the particular object pointed out. But when a testator bequeaths a legacy to a particular college for the education of priests in the diocese of Winchester, when he goes on to ask that masses may be said yearly for the rest of his soul by the members of the said college, as he did in *In re Rymer* ('95, 1 Ch. (C. A.) 19, 64 L. J. Ch. 86), he localizes the institution, and the fair inference is that he means to give his money to that institution and to no other, and if the institution has ceased to exist at his death the legacy lapses. In the cy-près doctrine the Court is being generous at the expense of the next of kin or residuary legatee, but such generosity may be set off against the narrow intolerance of the Mortmain Acts, which have defrauded charities of innumerable gifts.

The Yorkshire Relish case, *Powell* v. *Birmingham Vinegar Brewery Co.* ('94, 3 Ch. (C. A.) 449), decides nothing new, but it is useful as impressing once more on the commercial conscience the principle of English law, that, trade mark or no trade mark, you must not pass off your goods as the goods of another man. The desire to share in another's prosperity is a natural desire which extends from legacy hunting to petty larceny. In *Powell* v. *Birmingham Vinegar Brewery Co.* it took the form of a desire to share the benefits of the

well-known Yorkshire Relish. Yorkshire Relish was recently struck off the register of trade marks, and is therefore *publici juris*. But it is one thing for words to be *publici juris* and another thing for them to be used as 'catch-words' by a rival maker in a way to induce a purchaser to believe he is buying the original maker's sauce. You may use the words, the law says to the rival maker, but you must effectually distinguish your goods, *if you can*. This option resembles very much that of Portia, when she invites Shylock to take his pound of flesh but at his peril to shed a drop of Christian blood. The distinction between this case and *Reddaway* v. *Benham*, the 'camel hair' case (14 R. March, 205), is one that may well puzzle the honest trader.

So many businesses are now carried on by a receiver and manager that it is well their position—somewhat nebulous hitherto—should be defined, as it has been by the Court of Appeal in two recent cases—*Burt* v. *Bull* ('95, 1 Q. B. 276) and *Crouk* v. *Owen & Co.* (14 R. March, 311). A receiver and manager appointed by the Court is, it seems, in a position analogous to that of an executor or trustee carrying on a business—he is personally liable prima facie on his contracts. A receiver appointed under a debenture holders' trust deed, on the other hand, is a mere agent of the company, appointed by the debenture holders, and as such is not personally liable on his contracts unless he holds himself out as a principal. A receiver appointed by the Court has, however, this advantage, that in all matters of importance he can get the advice or direction of the Court. A personal liability on contracts may seem onerous, but the receiver takes the burden with the benefit. He, like a liquidator, is not a gratuitous bailee; on the contrary, his office is often a lucrative and a very desirable one where the assets are large.

In re Hamilton, Trench v. *Hamilton* ('95, 1 Ch. 373). The restraint on anticipation, once the married woman's charter—her safeguard against being kissed or kicked out of her property—is fast vanishing. *Cessante causa cessat et lex*, which is, being interpreted, the new woman can take care of herself. She is no longer the sweetly docile and dependent being, the clinging ivy, she used to be. The Conveyancing Act first began to tamper with the restraint. Then the Married Women's Property Act, 1893, s. 2, gave the Court power to order payment of costs out of property subject to a restraint—a power which the Court has availed itself of in several recent cases (*In re Godfrey*, 13 R. Jan. 176; *Lowry* v. *Derham*, '95, 2 I. R. (C. A.) 123); and now, by the Trustee Act, 1893, the Court may

impound a married woman's life interest subject to a restraint to recoup a trustee whom she has instigated to a breach of trust. Mere consent, by the way, is not instigating (*Bolton* v. *Curre*, '95, 1 Ch. 544, 64 L. J. Ch. 164). The time is coming when the restraint on anticipation will be as curious a relic to the historical student of the rise and progress of woman as the cucking-stool or the brank.

Our law is very jealous, and rightly, of making contracts for people, of implying conditions which the parties themselves have not expressed—a *dum casta* clause in a separation deed for instance. When husband and wife agree to say

> 'farewell for ever,
> Cancel all their vows,'

they have no longer any right to arrogate control over each other's conduct. If a husband thinks his honour involved, let him stipulate for propriety, otherwise there is no molestation (*Fearon* v. *Earl of Aylesford*, 14 Q. B. D. 792). An attempt was made in *Sweet* v. *Sweet* ('95, 1 Q. B. 12, 64 L. J. Q. B. 108) to fritter away this decision on the ground that it did not apply where the wife herself, as distinguished from her trustee, was suing on the covenant—a distinction since the Married Women's Property Act, 1882, as flimsy as that between 'molest' and 'annoy.' Adultery by a wife, even when husband and wife are living together, does not relieve him from the marital obligation to provide her with necessaries. She is not to starve. That would be Pharisaism re-incarnate.

The condition commonly inserted now in conditions of sale, giving the vendor a right to rescind if any requisition is pressed which he is unable or unwilling to answer, is, as Romer J. described it in *Smith* v. *Wallace* ('95, 1 Ch. 385, 64 L. J. Ch. 240), a 'formidable weapon' in the vendor's hands. It has become necessary, owing to the complication of real property titles, which is little short of a scandal to English law, but it derogates very greatly from the rights of the purchaser, and it must be fairly used. A vendor, for instance, must not, as he did in *Smith* v. *Wallace*, keep the purchaser on the hook and play him while he is angling all the while for another purchaser, a bigger fish. This is not genuine legal sport. Romer J. characterized it as 'tricky.' If the vendor means to use the power he must elect promptly. The end was that the vendor lost both his bargains. *Caveat vendor.*

An inalienable pension is a luxury, and it is quite natural that the possessor of it should wish to enjoy it in peace, undisturbed by importunate creditors. The debtor in *In re Painter* ('95, 1 Q.B. 85,

64 L. J. Q. B. 22) was in this position, so to avoid a committal order under the Debtors Act and to defeat the machinations of his creditors, he filed his own petition and got himself adjudicated a bankrupt. The Court had its doubts about the legitimacy of the proceeding, but could not declare it to be against the policy of the Bankruptcy Act. In a sense all bankruptcy is defeating creditors, but the law recognizes that a man is not to go about always weighed down by an incubus of debt. If he were, he could never retrieve his position or do his duty as a citizen. To get free of his creditors is as natural and legitimate a desire as to get out of prison. What with public examinations, suspending of discharges, and criminal prosecutions, the present law has made bankruptcy so much more unpleasant for the debtor that he may safely be trusted not to be too eager to present his own petition.

The law must not let itself be 'entangled in the cobwebs of the schools,' as was said of Cowley's poetry; otherwise it would be interesting to follow up the train of ideas suggested by *In re Alice Alderson* (1 M. B. & C. R. 495) as to a debtor absenting himself from his creditors. An Irishman in the fervour of his denunciation of absentee landlords once exclaimed, 'Why, sor, the land's just swarming with them.' In the same way a debtor may be there and not there, as Miss Alderson was at Tunbridge Wells, present indeed in the flesh, but masquerading under an alias. 'Is a debtor,' asked Vaughan Williams J., 'who goes to a meeting of his creditors disguised, present at the meeting?' Corporeally he is, but so far as creditors who may want to question him are concerned he might just as well be in bed or at the antipodes. So our matter-of-fact law regards it. A debtor 'absents himself' within the meaning of the Bankruptcy Act when he makes it impossible for his creditors to get at him. That is the common sense of the thing.

We find it necessary to remind our contributors and correspondents that it is impossible, except in very special cases, to insert articles at short notice, as we almost always have a considerable quantity of matter standing over. Long articles are much more subject to inevitable delay than short ones.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

In Memoriam.

W. E. HALL.

THE works upon International Law of the late William Edward Hall are read and valued in all English-speaking countries; wherever, indeed, any attention is given to the study of the subject. But no one from these works alone could form an idea of the man who may almost be said to have written them in the intervals of leisure from more congenial occupations. As one who for nearly forty years enjoyed Mr. Hall's friendship, I am desirous of attempting some description of his many-sided character, and of placing upon record the principal events in the life which has so prematurely closed.

William Edward Hall was the only child of William Hall, M.D., a descendant of a junior branch of the Halls of Dunglass, and of Charlotte, daughter of William Cotton, F.S.A. He was born August 22, 1835, at Leatherhead, in Surrey, but passed much of his childhood abroad; for Dr. Hall became Court physician to the King of Hanover, and was, I think, subsequently attached as physician to the British Legation at Naples. Hence, perhaps, Hall's taste in after-life for art and for modern languages. A constitution originally not too robust led to his subsequent education being conducted by private tutors, rather than at a public school, but at the unusually early age of seventeen, in December, 1852, he matriculated at University College, Oxford. In 1856 he became B.A., after taking a third class in the final classical school, and a brilliant first class in the then recently instituted School of Law and Modern History. He always attributed this, his first success in life, to the help and guidance which he received from Dr. Tristram, who was then, for a short time, taking pupils at Oxford, before leaving it for Doctors Commons. In 1859 he gained the Chancellor's Prize for an English Essay upon 'The effect produced by the precious metals of America upon the greatness and prosperity of Spain,' having learnt Spanish in order to be able to consult his authorities in the original. He had previously become a member of Lincoln's Inn, and read conveyancing with Mr. Braithwaite and equity with Mr. (afterwards Vice-Chancellor) Wickens. He was called to the bar in November, 1861, but was not, I think, over-assiduous in attendance at his chambers in Stone Buildings. He

was living at the time in the Berkeley Chambers in Bruton Street, whither I soon followed him, and was then throwing most of his energies into the study of Italian art, improving also his conversational knowledge of the Italian language. He had already travelled over a great part of Europe, bringing home admirable sketches, then usually of churches or street architecture, and about this time became an enthusiastic member of the Alpine Club; making several first ascents, notably that of the Lyskamm [1], and of the Dent d'Hérens; taking a leading part in the famous special committee of 1864 on ropes and ice-axes; contributing many articles, some of them illustrated with drawings by his own hand, to the journal of the Club [2]; and rejoicing in the dinners, then held at a little French restaurant in St. Martin's Lane, of an inner coterie of the climbing fraternity.

In March, 1864, I persuaded Hall to leave the so far unfruitful purlieus of Equity, and to share the chambers which I had just taken in Brick Court. He at the same time joined the Western Circuit, doubtless influenced in the choice of it by the fact that his father was then residing at Heavitree, near Exeter. It must have been almost immediately afterwards that he accompanied Mr. Auberon Herbert on a visit to the seat of war in Denmark, where the friends were several times under fire: once, I think, accompanying a sortie of Danish troops from Sonderborg, armed only with walking-sticks. In September, 1866, Hall married Imogen Emily, daughter of Mr. (afterwards Mr. Justice) Grove, and took a house in Onslow Gardens, still keeping up his habits of travel, as also his keen interest in military matters, which induced him in 1867 to publish a pamphlet entitled 'A Plan for the re-organization of the Army.' After the death of his father, in 1869, he was in easy circumstances, especially as he never had any children. In 1868 he went out on behalf of the Tichborne claimant to South America, and in 1873 made a sporting tour in Lapland. He also did some good work, the results of which are embalmed in Blue-books, for several Government Offices. Thus, in 1871, he acted as an 'Inspector of returns,' under the Elementary Education Act of 1870, for a district in the West of England; and was occasionally engaged in subsequent years, down to 1875, in assisting the permanent staff at Whitehall to set the new system going. In 1876 and 1877 he was commissioned by the Board of Trade to report upon the oyster fisheries at Arcachon and other places in France, as also upon some of the English oyster-beds.

Towards the end of the seventies, Hall settled at Llanfihangel,

[1] Peaks, Passes, and Glaciers, second series, ii. pp. 383–396.
[2] e. g. Alpine Journal, i. pp. 92, 141, 209; iii. p. 200; iv. p. 327; v. p. 23; vii. p. 169.

a fine old Elizabethan mansion, with a good deal of land about it, in Monmouthshire. Here he became a Justice of the Peace, entertained shooting parties, and indulged his taste for scientific gardening; for his knowledge of botany was considerable, and he had a passion for flowers. Here also he was able to arrange to advantage the collections of antiquities and works of art, to which his frequent tours enabled him to make constant additions. In 1884 he took some steps towards securing a seat in Parliament at the next election, and was adopted as Conservative candidate for Hereford. But the expedition for the rescue of Gordon was being organized, and Hall would not neglect the opportunity, which, as he thought, was open to him, of entering Khartoum with the British forces. Travelling on a camel, often without any escort, he reached the head-quarters at Dongola; but things were then so critical at the front that Lord Wolseley ordered him back to Cairo. Nothing daunted, he sailed round to Suakin, and, though just too late for the encounter at McNiell's zariba, he rode over the battle-field two or three days afterwards, under a dropping fire from the enemy. The negotiations carried on after his return with several Parliamentary constituencies led to no result; and in May, 1886, came the death of his wife, which was a terrible blow to him, and was followed by a prolonged absence from England, during which he visited India, giving much study to the question of the defence of its North-Western frontier, Burmah, and Japan. In 1888 he paid a flying visit to Bulgaria, when he characteristically made a careful map of the field of Slivnitza; hurrying straight back to a shooting which he had taken in Norway. Still restless, he spent the autumn of 1889 and spring of 1890 in Greece and Egypt. In April, 1891, he married Alice Constance, daughter of Colonel Hill, of Court of Hill, Shropshire, and settled down for a few more years of happiness at Coker Court, an interesting old mansion, with gardens and park, in Somersetshire; and here it was that, on November 30, 1894, in the fullest enjoyment, as it seemed, of mental and bodily vigour, he was suddenly struck down.

So passed away one of the most accomplished men of his generation, whose very versatility prevented him from achieving a larger measure of what is called success, just as his capacity for doing good service for his country was beginning to be recognized. He was a good friend, and perhaps also a good hater. He was an extraordinarily rapid worker, a keen sportsman, absolutely fearless, sensitive and proud, modest and ambitious, a delightful companion. In Law, as a profession, he took no great interest, nor had he the patience to await its tardy favours. His ideal was the English country gentleman, with cosmopolitan experiences, encyclopaedic

knowledge, and artistic feeling. His own rare excellence as an artist is attested by hundreds of water-colour sketches, taken in every quarter of the globe, and his knowledge of the archaeology of art by the extensive collections which he had made of typical objects of all kinds, from Greek vases to Japanese carvings. His real vocation in life was, I believe, to have become a great general.

Hall had at one time amassed materials and had formed plans for ambitious works upon such topics as the history of civilization and the history of the British Colonies, but was at length led, almost by accident, to concentrate his literary activity upon that department of thought in which he was destined to become an acknowledged master. In 1874 he published a thin octavo upon 'The Rights and Duties of Neutrals,' which he followed up in 1875 by an article in the Contemporary Review upon 'Certain proposed changes in International Law.' His *magnum opus*, 'International Law,' which first appeared in 1880, and of which a fourth edition is now in the press, marks an epoch in the literature of the subject. No work so well-proportioned, so tersely expressed, so replete with common-sense, so complete, had ever appeared in this country. It at once became an authority even amongst Continental jurists, to whom, as a rule, his adherence to what they call *l'école historico-pratique* is distasteful. It was only last year that we welcomed in these pages the publication of his valuable monograph upon 'The Foreign Powers and Jurisdiction of the British Crown [1].'

The position occupied by Hall among International lawyers was beginning, as already hinted, to obtain recognition from the powers that be. He was selected by Lord Salisbury and Lord Knutsford to be one of the British arbitrators whenever the arbitration should take place between this country and France with reference to the lobster fisheries in Newfoundland; and the appointment was fully approved by Lord Rosebery, Lord Kimberley and Lord Ripon, after the change of Government. In anticipation of the arbitration, Hall rendered services, in the preparation of materials and arguments, which were highly appreciated by the Foreign and by the Colonial Office.

Hall had on several occasions delivered a course of lectures on International Law at the Royal Naval College at Greenwich; and a course of such lectures was in fact interrupted by his death. His proficiency in his subject had been long ago recognized by his election in 1875 as *Associé*, and in 1882 as *Membre*, of the 'Institut de Droit International'; at the meetings of which learned body his

[1] Law Quarterly Review, x. p. 276.

opinions were received with the respect which they deserved. It is with regretful recollections of happy days of debate and festivity, passed with him at the Hague, at Paris, at Oxford, at Turin and at Heidelberg, on the occasion of such meetings, that I close this article.

T. E. HOLLAND.

NOTES ON INSURANCE LAW.

On Express Warranties.

IT is laid down at page 632 of the second edition of Arnould on Insurance, that non-compliance with an express warranty contained in a marine policy will be excused if a subsequent law should be passed rendering compliance with the warranty illegal. A similar statement is to be found in the later editions of Arnould and in Phillips on Insurance; and in accordance with the statements of these writers it is provided in the thirty-fourth clause of the Bill which has been brought in to codify the law of Marine Insurance that 'non-compliance with a warranty is excused, when compliance with the warranty is rendered unlawful by subsequent legislation.'

It seems to me, however, that this is not the law and ought not to be the law.

Arnould makes the following statement: 'It is an old principle of law, that if a man covenants to do a thing which is lawful at the time, but an act of Parliament comes in and hinders him from doing it, the covenant is repealed: the same rule extends to warranties, and it may be stated generally, that compliance with a warranty will be dispensed with, if it be rendered unlawful by a law enacted since the time of making the policy.'

Phillips in section 769 says: 'A compliance with a warranty or any other agreement is dispensed with, if it be rendered unlawful by a law enacted after the time of the making of the policy.' Both authors cite in support of these views the case of *Brewster* v. *Kitchell*, 1 Lord Raymond, 321. This case, however, by no means decides the point; it merely shows that the performance of a stipulation or promise is dispensed with if it is rendered unlawful by subsequent legislation, and it has no application to a condition. Indeed it is clear on principle and authority that where a contract is made subject to a condition, and compliance with a condition is rendered unlawful by subsequent legislation, the result is to make the contract itself voidable (see Comyns' Digest, Condition D (3), *Davis* v. *Cary*, 15 Q. B. 418, *Brown* v. *Mayor of London*, 30 L. J., C. P. 230, and Pollock on Contracts, sixth edition, pages 415 to 419, where the questions relating to impossible contracts are very carefully

investigated). Now a warranty in a marine policy is a *condition* rendering the contract voidable in case of non-compliance and not a stipulation for breach of which an action lies. It is this essential distinction between a condition and a stipulation that Mr. Arnould and Mr. Phillips have overlooked.

Suppose that an insurance is effected on a ship with a warranty that she is to sail from London to Quebec on or before the 1st of August, and that legislation subsequent to the policy made it unlawful for the ship to sail on such a voyage before the 1st of September, it surely could not be held that the underwriters were liable on the policy if the vessel sailed on the 1st of September, for to hold this would be to make them liable on a contract materially different from that entered into by them.

It is, on the other hand, important to note that non-compliance with a warranty in a marine policy will not be excused on the ground of compliance being rendered impossible by perils insured against. This important point is established by *Hore* v. *Whitmore*, Cowper, 784, and is referred to in Arnould, second edition, p. 784. It is true that the contrary is asserted by Phillips in section 770, where he says, that 'when the fact warranted is falsified by the direct effect of a peril insured against, it is not a breach of the warranty.' But in support of this view he cites the case of *Havelock* v. *Hancill*, 3 T.R., 277, 1 R.R. 703. This case, however, when carefully examined will be found to decide nothing more than this—that where there is a warranty that the trade on which the ship is or shall be employed is lawful, it only means that the trade on which the ship is or shall be employed *by her owners* is lawful, and that therefore the underwriters are liable for a loss occurring whilst the ship is engaged in an unlawful trade, if the master was so employing her *barratrously* and without the consent of the owners.

On Bottomry.

At page 299 of Arnould on Marine Insurance there is the following statement relating to bottomry: 'The borrower on bottomry and respondentia has no insurable interest in the property pledged, except in as far as the value of such property exceeds the amount for which it is pledged. If pledged to its full value, it is obvious that the borrower can have no insurable interest in its safety, for in such case, if the property arrives, it goes to satisfy the debt; if lost by the risks within the hypothecation, the borrower is discharged.'

This statement is, it is submitted, for the following reasons erroneous. If the bottomry bond is in the ordinary form, the

money lent on bottomry is due in every case except that of *an absolute total loss* (*Stephens* v. *Broomfield*, L. R. 2 P. C. 516; *Broomfield* v. *Southern Insurance Company*, L. R. 5 Ex. 192). It follows that in the case of any damage or loss not amounting to an absolute total loss, the borrower continues liable for the debt, and at the same time incurs a loss to the extent of the damage his property has sustained. It follows therefore clearly that he has an insurable interest for the same reason as a mortgagor has an insurable interest, but that he cannot in the case of an absolute total loss recover more than the excess, if any, of the value of his property over the amount of what is due under the bottomry bond.

On the other hand, the *lender* on bottomry has an insurable interest in respect of the loan, inasmuch as he loses the debt in the case of an absolute total loss of the property. He therefore can recover against the underwriter in case of an absolute total loss, but he can do so in no other case of loss, unless the bottomry bond provides, as certain foreign bottomry bonds do, that the debt shall be diminished in proportion to the damage which the property may sustain by the perils of the seas. (*Broomfield* v. *Southern Ins. Company*, *supra*.) It follows from all these considerations that the question whether the borrower or lender on bottomry has an insurable interest is easily solved by applying the ordinary principles which govern insurable interest in general, and taking into consideration the nature and effect of the particular instrument of hypothecation, and that no rules other than the ordinary rules of insurance law are required for its solution.

ARTHUR COHEN.

THE LAW OF NATURE.

HE who, being first trained in the manner of English legal thinking, comes thereafter to the study of the juridical theories prevalent upon the Continent, finds himself a stranger in a strange land. Therein he wanders disconsolate, hearing unknown doctrine taught in an unknown tongue. Of this discordance between English and Continental thought the causes are various, but no small share is to be attributed to the influence of a curious difference between English and Continental legal nomenclature. Of the power of words over thought there is indeed no more notable or profitable example. It has often been remarked that in most languages, ancient and modern, the same term is used to signify both law and right. *Jus*, *Droit*, *Recht*, *Diritto*, all have this double signification. To this rule modern English is a striking exception. We have no term that combines the ethical and juridical meanings; *right* is purely ethical, *law* is purely juridical. This indeed was not always so, for the Anglo-Saxon *riht* has the double meaning still possessed by its Continental relatives, and, in the old books, we find *common right* used as the equivalent of *common law*. How it came to pass that our language rejected this ancient and universal usage we know not. Bentham would probably have suggested, had the matter been called to his attention, that, to the practical good sense of Englishmen, the profound difference between law and justice was too obvious to admit of their being called by the same name. Be this, however, as it may, there can be no doubt of the immense influence exerted by this difference of nomenclature in differentiating English from Continental juridical and even ethical thought. This peculiarity of our speech has been in part beneficial, in part detrimental, to our thinking. It is commonly an advantage to call different things by different names, and the more closely two ideas are related, the more necessary is it, for clear thinking, that they should be verbally distinguished. On the other hand, when two related things are called by the same name, this identity is an ever present indication and reminder of the relation between the things signified. Hence it is, that English thought has so clearly distinguished between law and right, jurisprudence and ethics, as in great measure

to have overlooked the connexion between them, and to have eliminated the ethical element from the idea of law. Continental theory, on the other hand, shows a tendency—to English eyes, at least—to fall into exactly the opposite fault, and to see so clearly the intimate connexion between the two ideas, as to fail to draw between them a sufficient distinction.

To this difference of language, and to the consequent difference in the tone of juridical speculation, we may attribute, more than to any other single cause, the acceptance on the Continent and the rejection in England of that which the French call *droit naturel*, and the Germans *Naturrecht*. It follows, from what has been already said, that our language can supply no equivalent for these terms, for they combine ethical and juridical significations in a manner not permitted to English speech. To express the ethical meaning we must use the terms *natural right* or *natural justice*; while the juridical meaning is expressed by the terms *natural law* or the *law of nature*. For a full equivalent for the French and German expressions, we may resort to the corresponding Latin *jus naturale*, which possesses the same twofold meaning, being either *justitia naturalis* or *lex naturae*.

It has been much the fashion on this side of the Channel, in jurisprudence as well as in some other matters, to go our own way without much knowledge or care of what is being done elsewhere. We have said in our hearts: 'Shall we, who have given laws to half the earth, go to learn legal science from our neighbours? Or shall we, who have learned from Bentham and his like to follow in such matters the guidance of clear-eyed common sense, go to fill our bellies with the east wind of German metaphysics?' I shall not here stay to consider whether this insular independence is justified by its works. It is perhaps a tenable opinion that we have little to learn from Continental jurisprudence, but, whether this is so or not, it is the part of wisdom to hear the other side and to know our enemies. Now, for the understanding of the legal thinking of our neighbours, it is essential that we should comprehend the pervading and fundamental doctrine of *jus naturale*. This is not of yesterday; it is an inheritance (peradventure *damnosa*) descended from old time; and an adequate comprehension of it is best attained by the study of its history, much doctrine being best known and judged by its ancestry and descent. To an outline of that history the following pages will be devoted.

In legal science, as in so many other departments of thought, rational speculation begins with the Greeks. In the practical work of law-making they were far excelled by the Romans, but it is to Athens and not to Rome that we owe those doctrines which formed

the speculative basis of ancient jurisprudence, and which continue to this day to influence juridical thought. Chief among those doctrines is that of *jus naturale*. When men came to consider the notions of right and justice that prevailed at different times and places, they found them, not uniform, but infinitely various. What one nation regarded with approval, another condemned. The Greeks buried, but certain barbarians ate, the dead bodies of their fathers, and each people thought the conduct of the other, in this respect, abominable. Hence arose the question whether this whole matter of right and wrong, justice and injustice, was a mere affair of custom and convention; or whether, underlying all these variations of opinion and sentiment, there was a permanent, uniform, and theoretically valid distinction between that which is in itself right and just, and that which is in itself wrong and unjust—a distinction to the imperfect and partially mistaken recognition of which the various moral sentiments of men were due. Another line of thought led up to the same question. That which is just is very often different from that which is expedient for the doer of it. Justice is not seldom the good of others rather than that of the just man himself. Is not justice, therefore, suspiciously like folly, and has it any basis in reason and the nature of things? Is it not rather the product of mere human convention, established by the weak and simple for their own benefit, and as a protection against the strong and cunning? Is it not, therefore, the part of the strong and cunning to disregard any such arbitrary conventions, and to go their own way to their own end, the realization of their own highest good? If there is any such thing as justice in itself, apart from human convention, is it anything save the right of the strongest to use all the means given him by his strength for his own preservation and advancement?

The answer made to these questions by Greek philosophy is that there are two distinct species of right—the right absolutely or in itself, and the right as recognized and established among men. This distinction was expressed by the use of the contrasted terms φύσις and νόμος, nature and convention—terms which were of general application to indicate this same contrast between anything which exists of itself or in the nature of things, and anything which is the product of human art, contrivance, custom, institution, or convention. Thus it was a question with some whether the gods existed φύσει or merely νόμῳ. Νόμος, of course, is here used in an earlier and wider sense than that later and specialized application in which it signifies one particular species of human institution, namely statute law.

Such then was the nature and origin of the distinction between

natural right (*φυσικὸν δίκαιον*) and conventional or positive right (*νομικὸν δίκαιον*). From the conception of natural *right* to that of natural *law*, the transition was easy. The connexion between right and law—the aspect of law as the declaration and enforcement of the principles of right—was never overlooked by the Greek mind. Thus Plato speaks of the legislator as giving 'laws, written and unwritten, determining what was good or bad, honourable or dishonourable, just or unjust, to the tribes of men[1].' If, then, positive right was declared and enforced by positive law, was there not a natural law (*φυσικὸς νόμος*) which declared and enforced the principles of natural right? The unanimous reply of Greek philosophy was that such a law did in truth exist, and from that day to this such reply has continued to exercise a profound influence on the course of ethical and juridical thought. This transition from the conception of *φυσικὸν δίκαιον* to that of *φυσικὸς νόμος* was, in all probability, facilitated by the juridical implications of the terms *δίκη* and *δίκαιον*. When the same word means both right and law, it cannot be difficult to pass from the idea of natural right to that of natural law.

In the original use of the phrase natural right, the term *natural* means merely, as we have seen, the opposite of conventional; natural right is adequately explained as being that which is right in itself apart from human institution. But when we pass from this conception to that of natural law, we find that no such purely negative interpretation is in this case adequate. For law necessarily involves a legislator, and, therefore, if we assert the existence of natural law, we must be prepared to point out its source in some legislative authority. The reply of the Greeks was that the source of natural law was nature, and this reply involves a transition to a positive conception of nature as the personified universe and as giving laws to men. Natural law becomes the law of nature. This idea of nature as legislative obtained full development and definiteness only in the materialistic pantheism of the Stoics, but it was not peculiar to that school. That a life according to nature was the true end and duty of man was a doctrine which obtained a more or less prominent place in most of the Greek systems of ethics. In the mouths of some this principle received the merely negative interpretation already mentioned. To live according to nature was to despise the artificiality and conventionality of civilized life. In other philosophies, however, nature is conceived as the personified universe, and to follow nature is to obey those rules which are laid down by nature for the governance of rational

[1] Statesman, 295.

beings. In Stoicism, as I have said, this idea came to its full growth. Nature or the Universe was conceived by the philosophers of the Porch as a living organism, of which the material world was the body, and of which the Deity or the Universal Reason (Logos) was the pervading, animating, and governing soul. It was the duty and end of man as a part of this world-organism to live in harmony therewith, and to obey the precepts of that Reason by which all things are governed and directed. These precepts are the law of nature.

From the Greeks, and from later writers, natural law has received various other designations expressive of its different aspects. It was often called, as for instance by Aristotle, the Unwritten Law, as being inscribed neither on pillars of stone nor on brazen tablets, but solely in the hearts of men. This contrast between written and unwritten law is, however, of ambiguous import, being also used to express a distinction within the sphere of civil law itself. Under another aspect, natural law was called the Universal or Common Law (κοινὸς νόμος), as opposed to Particular or Special Law (ἴδιος νόμος). The law of the state was in force only within the boundaries of the state, nor did any two states use the same laws; but the law of nature was of universal force and validity. It is this aspect of natural law which was afterwards expressed by the Roman term *jus gentium*, the law of the nations or of the world. The law of nature, moreover, was conceived as valid, not only in all places, but also at all times, being without beginning or end; while positive law, on the other hand, was temporary and mutable. Hence, as we shall see, the Eternal Law (*lex aeterna*) of St. Augustine and the Schoolmen. Yet another term that came in later times to be used as the equivalent of the law of nature was the Law of Reason. It was from nature, conceived as rational—as animated by the Universal Reason of the world—that the law natural was deemed to proceed. Moreover, it is through the possession of reason that man is enabled to know the precepts of the law and to conform his conduct thereto. These precepts are addressed to, and perceived by, man's rational nature, and hence they constitute the law of reason. Finally, the theological aspect of this law, under which it was conceived as the divine law, was at all times more or less definitely recognized. Prior to the development of the pantheism of the Stoics, such recognition was little more than an echo of popular religious opinion. Stoicism, however, by its identification of God and nature, was led necessarily to identify the law of nature with the law of God. And when, on the rise of Christianity, the philosophical ideas of the Greeks became combined with the religious and theocratic ideas of the Hebrews,

this theological aspect of the law of nature came still more prominently into the foreground of thought.

We must not overlook the confusion and indeterminateness introduced into much of ancient thought by the twofold meaning of the terms nature and reason. Nature is either the universal nature or human nature. Reason is either that of the soul which animates and rules the world, or that of man himself. Primarily and principally, as we have already seen, the law of nature or of reason is referred to the universal nature or the universal reason, but a tendency to the anthropological interpretation of the doctrine is distinctly traceable, and the two conceptions are often found more or less confusedly combined[1]. In later times, when the pantheistic idea of universal nature as legislative had disappeared, the doctrine that the law of nature was that which had its source in human nature, played, as we shall see, a great part in the history of ethical speculation, being indeed the great rival of the theological doctrine that such law proceeds from the divine will.

After this general statement of the origin and nature of the conception variously expressed by the terms law of nature, law of reason, divine law, universal law, eternal law, and unwritten law, we may refer to a few passages in which Greek writers have given expression to this idea. In the writings of Plato we find clear recognition of the existence of natural right. The Gorgias, for instance, contains a vigorous exposition, by one Callicles, of the stock sophistical and sceptical argument against the reality of any natural right, other than that right which is coincident with might, the right of the strongest to use his strength in his own interest; and to a refutation of this argument no small part of Plato's ethical writings is devoted. One of the chief objects of the Republic is to demonstrate the reality of a natural justice, of which conventional justice is but an imperfect image or shadow, and to prove that to follow after this reality is not foolishness but the part of a wise man. 'Justice in her own nature,' he concludes, 'has been shown to be best for the soul in her own nature. Let a man do what is just, whether he have the ring of Gyges or not, and even if, in addition to the ring of Gyges, he put on the helmet of Hades[2].' The idea, however, of a natural law, declaring and enforcing this natural right, as positive law declares and enforces positive right, is not prominent in the thought of Plato. Where it does appear, it is rather in its theological than in its philosophical form. Yet in the passage of the Gorgias already referred to, the

[1] We see, for instance, the two ideas combined in Cicero: 'Sic enim est faciendum ut contra universam naturam nihil contendamus, ea tamen conservata propriam naturam sequamur.' De Officiis, i. 31. 110.

[2] Republic, 612.

Sophist expressly applies the distinction between *νόμος* and *φύσις* to law as well as to justice. Xerxes invaded Hellas, and his father the Scythians, not according to that artificial law which we invent and impose upon our fellows, but none the less in accordance with the law of nature [1].

In the writings of Aristotle, on the other hand, we find express and repeated recognition, not only of the two species of right, but also of the two corresponding forms of law. The following passage from the Nicomachean Ethics contains a clear statement of the first of these distinctions: 'Of political justice [2], one part is natural and the other conventional. Natural justice is that which has the same force everywhere, and does not depend upon being received. Conventional justice is that which originally was a matter of indifference, but which, when men have instituted it, is indifferent no longer. . . . Now some think that all justice is conventional, because, while the natural is immutable and has everywhere the same force (as fire burns here and in Persia), they see the rules of justice altered. But this is not so [3].' The following extracts from Aristotle's Rhetoric exhibit, on the other hand, the transition from the conception of natural right to that of natural law: 'Let injustice be defined as the voluntary commission of hurt in contravention of law. Now law is either universal or particular. The particular law I call that by whose written enactments men are governed. The universal law consists of those unwritten rules which appear to be recognized among all men [4].' And again: 'Right and wrong have been defined in reference to two kinds of law. . . . Particular law (*ἴδιος νόμος*) is that which has been established by each people in reference to itself. . . . The universal law (*κοινὸς νόμος*) is that which is conformable merely to nature [5].' And again: 'Equity remains for ever and varies not at any time; neither does the universal law, for this is in conformity to nature; but the written law varies often [6].' In these passages we see natural law recognized in most of its various aspects, the theological, however, being conspicuous by its absence. This law is (1) unwritten (*jus non scriptum*), (2) universal (*jus gentium*), (3) eternal and immutable (*lex aeterna*), and (4) according to nature (*lex naturae*).

We have already seen that it was in the teaching of Stoicism

[1] Gorgias, 483.

[2] The term political justice (*πολιτικὸν δίκαιον*) must not be confounded with conventional or positive justice (*νομικὸν δίκαιον*). The former is that which exists between the free and equal citizens of a state, and is opposed to the quasi-justice (economic justice) which regulates the relations of the members of a family. The distinction is of no theoretical importance, although of considerable historical interest.

[3] Nic. Eth. v. 7.

[4] Rhetoric, i. 10.

[5] Rhetoric, i. 13.

[6] Ibid. i. 15.

that full development was attained by the doctrines, that a life according to nature was the end of man, and that to the dictates of an eternal and unchanging law of nature all human action should be conformed. The opinions of the earlier and Grecian Stoics are for the most part known to us only at second hand, and we shall shortly have occasion to consider the Stoical theory in that later form in which it is presented to us by Cicero and other Roman writers. In the meantime, however, we may cite a celebrated fragment of early Stoical literature. In the Hymn of Cleanthes, the successor of Zeno, the founder of Stoicism, we have a remarkable expression of the conception of natural law in its aspect as the eternal and universal law of God governing and directing all things. 'O King most high, nothing is done without thee, neither in heaven, nor on earth, nor in the sea, except what the wicked do in their foolishness. . . . But the wicked fly from thy law, unhappy ones, and though they desire to possess what is good, yet they see not, neither do they hear, the universal law of God. . . . There is no greater thing than this, either for mortal men or for the gods, to sing rightly the universal law [1].'

Such then was the doctrine of natural law as it originated in the intellect of Greece. We have now to examine briefly the chief episodes in the subsequent life-history of this celebrated and influential conception. From Athens to Rome it went with the rest of Greek philosophy, and in the writings of Cicero it finds eloquent expression. Cicero was a pupil of Posidonius, the leading Stoic of his day. Stoicism had by this time, however, assumed a liberal and eclectic character, which doubtless helped to commend it to the practical Roman mind, and the writings of Cicero are characterized rather by a reasonable eclecticism than by a rigid adherence to the doctrines of any particular school. From his works we may gather a very tolerable notion of the juridical and ethical theories of Greece as echoed in the language of Rome. The *φυσικὸν δίκαιον* of the Greeks appears as *justitia naturalis* or *jus naturale* (in its ethical sense). The *φυσικὸς νόμος*, which declares and renders obligatory the *φυσικὸν δίκαιον*, appears as *lex naturae* or *lex naturalis* or *jus naturale* (in its juridical sense).

'Of all these things respecting which learned men dispute, there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature [2].' 'There is indeed a true law (*lex*), right reason, agreeing with nature, diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding. . . . It is not allowable to alter this law, nor to derogate from it, nor

[1] See Grant's Ethics of Aristotle, i. 266.

[2] De Legibus, i. 10. 28.

can it be abrogated. Nor can we be released from this law either by the senate or by the people, nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens; one law to-day and another hereafter; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God the framer and proposer of this law[1].' 'Law is the highest reason, inherent in nature, which commands those things which ought to be done and forbids the contrary[2].' 'There is a reason issuing from nature, impelling towards right and dissuading from wrong, which did not then first begin to be law when its dictates were expressed in writing, but when it first arose, and it arose at the same time as the divine mind. Wherefore the true and highest law, well fitted to command and forbid, is the right reason of the supreme divinity (*recta ratio summi Jovis*)[3].'

When from the speculations of Cicero we turn to the more practical work of those great lawyers whose labours, during the first three centuries of the Christian era, constructed the imposing fabric of the Roman law, we find that the law of these men is much better than their philosophy, and that such fragments of abstract doctrine as may be extracted from their writings are little more than re-statements, not always very intelligent, of the theories already examined by us. The Romans accepted the conception of natural law as they received it from the Greeks, and used it as an instrument of legal development and reform. The law natural is to the law civil as the ideal is to the real, and the spirit of reform saw therein the pattern to which the laws of the state should be more and more conformed. The only matter worth special notice in this connexion is the use by the Roman lawyers of the term *jus gentium* as the equivalent of *jus naturale*. 'Every people,' says Gaius, at the commencement of his Commentaries, 'governed by law and custom, uses law which is in part peculiar to itself and in part common to all mankind. That law which any people establishes for itself is peculiar to itself, and is called the civil law (*jus civile*), as being the particular law of the state (*jus proprium civitatis*). But that law which natural reason has established for all men, is observed by all peoples alike, and is called the law of nations (*jus gentium*), as being that which all nations use.' By Cicero and other writers, and by Gaius himself in other places, this *jus gentium* is expressly identified with *jus naturale*. At first sight this contrast between *jus gentium* and *jus proprium civitatis* is identical with Aristotle's distinction, already referred to, between κοινὸς νόμος and ἴδιος νόμος. It is commonly accepted doctrine, however, that the *jus gentium* was a purely Roman idea, attained by Roman

[1] De Republica, iii. 22. 33. [2] De Legibus, i. 6. 18. [3] Ibid. ii. 4. 10.

lawyers long before any knowledge of a *jus naturale* had come to them from Greek philosophy, and that it was only after the introduction of such philosophy that the Romans came to identify their own *jus gentium* with the κοινὸς νόμος of the Greeks. What amount of truth, if any, there is in this theory we cannot now stay to consider.

At the commencement of the Christian era we find the Greek theory of natural law coming into contact with the theology of the Hebrews. In the ethical doctrines, both of Christian and Jew, the conception obtains a prominent place. The inevitable result of this alliance with Hebrew monotheism is that the theological aspect of the law of nature becomes entirely predominant. Nature is identified with God, and the law of nature with a particular part of the law of God—that part, namely, which is known to men independently of any express revelation or institution, as opposed to that part which is known only as written in the Scriptures of the Old and New Testaments, and which came subsequently to be distinguished as the *positive* divine law. In the writings of Philo Judaeus we find constant reference to natural law and justice. 'The unerring law is right reason; not an ordinance made by this or that mortal, a corruptible and perishable law, a lifeless law written on lifeless parchment or engraven on lifeless columns; but one imperishable and impressed by immortal nature on the immortal understanding[1].' He speaks likewise of that 'right reason which is the fountain from which all other laws do spring[2].' And again of the virtuous man as 'taking God alone for his guide and living in strict accordance with the law, that is to say, with the right reason of nature[3].' So also in the writings of the fathers of the Christian church. St. Augustine distinguishes between the temporal law which is made by men and governs human states, and the *lex aeterna* which proceeds from the divine mind and rules the City of God. In the Divine Institutes of Lactantius we have an interesting criticism of ancient philosophy from the early Christian point of view, and an attempt is made to show the insufficiency of the pre-Christian forms of natural law and natural justice.

'Plato and Aristotle desired with an honest will to defend justice, and would have effected something if their good endeavours, their eloquence, and vigour of intellect, had been aided also by a knowledge of divine things. Thus their work, being vain and useless, was neglected; nor were they able to persuade any to live according to their precepts, because that system had no foundation from heaven. . . . For when they discuss the subject of virtue,

[1] Works of Philo Judaeus, iii. 516 (Bohn's Ecclesiastical Library).
[2] Ibid. iii. 517. [3] Ibid. iii. 520.

although they understand that it is very full of labours and miseries, nevertheless they say that it is to be sought for its own sake; for they do not see its rewards, which are eternal and immortal. Thus by referring all things to this present life they altogether reduce virtue to folly, since it undergoes such great labours of this life in vain and to no purpose [1].'

Natural justice is not folly, only because it is commanded by natural law, and this law has, as its legislator, God, and as its sanction, exceeding great rewards and punishments in another world. 'God Himself,' says Lactantius, 'is Nature [2].'

Henceforward, for many a barren century, there is nothing of any interest or importance in the way of juridical speculation, and it is not until the rise of the Scholastic philosophy that we find any manner of thinking that calls for our attention. Scholasticism was an attempt to construct a system of philosophy combining and harmonizing the doctrines of orthodox Christianity with those of ancient and pre-Christian thought. Such a system was primarily theological, but in its full development it included both ethics and jurisprudence—ethics as being intimately connected with religion, and jurisprudence or the theory of law (taken in its widest sense), as being bound up with the theory of ethics and with the doctrine of the divine governance of the world. Scholastic philosophy attained its completest development and most enduring expression in the writings of St. Thomas Aquinas, in the thirteenth century. The Summa Theologiae of this greatest of the Schoolmen contains a treatise De Legibus and another De Justitia, which together formulate a system of jurisprudence which has exercised immense influence on the subsequent course of thought, and which, within the domain of Roman Catholic philosophy, is to be seen alive and influential to this day.

The system of Aquinas is a skilful combination of the scattered elements of juridical doctrine to be found in the various authorities which constituted the recognized basis of Scholastic teaching. These elements stood, naturally enough, in grievous need of reconciliation, and this was effected by the dexterous application of that method of subtile distinction, to which the fame of the Schoolmen and the bewildering bulk and complexity of their philosophy are so largely due. Of these authorities the chief is Aristotle, who, as 'the Philosopher,' dominated Scholastic thought in all its later developments. St. Thomas's theory of justice, for example, is little more than a skilful and laborious attempt to present as a coherent and intelligible doctrine the confused and confusing reasoning contained in the fifth book of the Nicomachean Ethics. His theory

[1] Divine Institutes, Bk. v. ch. 18. [2] Ibid. Bk. ii. ch. 9.

of law, on the other hand, is much less intimately and directly connected with Aristotelian doctrine. The immediate authorities in this case are rather the Roman jurists and the fathers of the Church. From the scattered fragments of juridical doctrine to be found in these writings, the subtile and powerful intellect of the *Doctor Angelicus* has built up an imposing system that has served as the foundation of modern jurisprudence.

The most important addition made by Aquinas and the Schoolmen to the old theory of natural law, is the division of that law into two species, distinguished as the *lex aeterna* and the *lex naturalis*. This is an attempt to resolve the ambiguity which we have already noticed as inherent in the ancient doctrine. Nature means either universal nature or human nature; reason is either human or divine. No such ambiguity was tolerable to the spirit of Scholastic philosophy, and hence the distinction, unknown to the ancients, between the law eternal and the law natural. The former has its source in the divine reason; the latter in human reason. The former is the law of universal nature, that is to say, of God; the latter is the law of human nature. Differing thus in their source, these two differ likewise in their scope. Inasmuch as God is the ruler of the whole universe, that eternal law which is the dictate of the divine reason includes within its jurisdiction all the activities of the world, animate and inanimate, rational and irrational. But natural law, proceeding merely from the rational nature of man, governs nothing save the actions of man himself.

'There is a certain Eternal Law, to wit, Reason, existing in the mind of God and governing the whole universe. . . . For law is nothing else than the dictate of the practical reason (*dictamen practicae rationis*) in the ruler who governs a perfect community. Now it is manifest that if, as we have already seen, the world is ruled by divine providence, the whole universe is a community governed by the divine reason. And so this reason, thus ruling all things, and existing in God the governor of the universe, has the nature of law[1].' 'Just as the reason of the divine wisdom, inasmuch as by it all things were created, has the nature of a type or idea; so also, inasmuch as by such reason all things are directed to their proper ends, it may be said to have the nature of an eternal law. . . . And accordingly the Eternal Law is nothing else than the reason of the divine wisdom regarded as directive of all actions and motions[2].'

With respect to the operation of the *lex aeterna* a distinction must be drawn between the actions of rational beings and all other actions or processes. In the case of the latter, this law gives rise to *necessity*; in the case of the former, it produces merely *obligation*.

[1] Summa, 1. 2, q. 91, art. 1.

[2] Ibid. 1. 2, q. 93, art. 1.

To men the eternal law says: You ought; but to the rest of nature: You must. Man alone, by virtue of his prerogative of freedom, is able to break the precepts of this law, but from all other created beings it receives perfect obedience.

Lex naturalis, on the other hand, proceeds from the human reason and governs the actions of man only. Nevertheless, although its immediate source is the reason of man, its ultimate source is that of God. The former is merely the instrument by which man is enabled to know and participate in the dictates of the divine reason. Aquinas does not conceive the human reason as legislative or autonomous. This idea, formulated many centuries afterwards by Kant, was not admitted by Scholastic philosophy. 'Nullus proprie loquendo suis actibus legem imponit[1].' Natural law is not the command of the human reason, but that of the divine reason, revealed to man by his own reason as applicable to human actions and as a source of human obligation. Hence natural law is not something different from the eternal law, but is merely a particular part of it looked at from a particular point of view. It is the eternal law, not as it exists in the mind of its author, God, but as it exists in the minds of the rational beings that are subject to it. It is *participatio legis aeternae in rationali creatura*. Although all created things participate in the eternal law, yet, except in the case of man, such participation is irrational and is not a source of law. It is only in the case of man, therefore, that it is necessary to draw any such distinction as that between the *lex aeterna* and the *lex naturalis*.

'There is in men a certain natural law, namely a participation in the eternal law, whereby men distinguish between good and evil. . . . Since all things which are under divine providence are regulated by the law eternal, as we have already seen, it is plain that all things participate in some sort in this law: in so far, namely, as through its influence they have an inclination towards their proper activities and ends. Among other things, however, rational creatures are in a more excellent manner under the divine providence. . . . Wherefore they participate in the eternal reason, by which they have a natural inclination to their proper acts and ends; and such participation in the law eternal by a rational creature is called the law natural[2].'

The law of nature commands men to do that which is right, and to avoid that which is evil. It is not, however, the source of the distinction between right and wrong, good and evil. This distinction is founded in the nature of things, and would exist, though not recognized by any law, human or divine. Actions are forbidden by the law of nature because they are wrong, not wrong

[1] Summa, 1. 2, q. 93, art. 5.

[2] Ibid. 1. 2, q. 91, art. 2.

because they are forbidden. This law is the source, not of the distinction between good and evil, but of that between obligation and liberty. It is by virtue of its commands, that the observance of the good and the avoidance of the bad is advanced to bounden duty. This law is eternal and immutable, the same at all times and places, written with the finger of God in the hearts of men; and although the record may be in part obliterated or corrupted by the evil and weakness of human nature, it can never be wholly erased. All human law must conform to this, and derives all its validity from such conformity. 'All law established by men has the true nature of law so far only as it is derived from the law of nature. But if on any point it conflicts with the law of nature, it is not law but rather the corruption of law[1].'

We have seen that the eternal law is divisible into two parts, one of which governs the voluntary actions of men and is the source of moral obligation, while the other governs all other operations of created things and is the source of physical necessity. In the minds of the Schoolmen these two parts were combined into a single whole by the conception of God as the ruler and lawgiver of the universe. Modern science, however, either rejects this conception altogether, or else disregards it as irrelevant. The result is that the unity of the old Scholastic *lex aeterna* has disappeared. It is now a commonplace of modern thought that between the physical law of nature and all other laws (including the moral law of nature if any such there be) there is a merely verbal relation. As applied to the operations of inanimate nature, the term law has come to mean nothing more than the expression of a general principle. The laws of nature are merely the formulas in which are expressed the uniformities of nature. Nevertheless it is true, and is a curious fact in the history of words and ideas, that the natural law, or (to use its Greek equivalent) the physical law, of the modern scientist, derives its origin from the φυσικὸς νόμος of the Stoics through the *lex aeterna* of the Schools.

The system formulated by Aquinas, and repeated after him by Soto and Suarez and a score of less celebrated doctors, long ruled the juridical thought of Europe[2]. In the first years of the seventeenth century, however, we hear the beginning of a new way of thinking, and the writings of Grotius on the Continent, and of Hobbes in England, mark the commencement of modern ethics and jurisprudence. A characteristic feature of the new epoch is the gradual enfranchisement of these sciences from the bondage of

[1] Summa, 1. 2, q. 95, art. 2.

[2] As for English literature, we may see an eloquent expression of these Scholastic doctrines in the first book of Hooker's Ecclesiastical Polity.

theology, and this separation was not without its effect on that doctrine whose history we are now tracing. The theological theory of natural law tends more and more to give place to a rival type of doctrine which may be distinguished as the metaphysical. Though rarely rejecting as actually invalid the Scholastic conception of the divine will as legislative, philosophers begin to disregard it as at least irrelevant in a secular science, and to seek another and independent source for the precepts of natural law. This source is the rational nature of man. The ancients derived this law from the universal nature; mediaeval theologians from the divine nature; modern philosophers from human nature. As the system of Aquinas may be taken as the type of the theological theory, so the doctrine of Kant is the most perfect example of the metaphysical. Before examining this doctrine, however, it will be advisable to glance briefly at the views expressed by Grotius and Hobbes, the founders of the new order. More than this we cannot do, for the conception of a law natural pervades the whole of the ethics and jurisprudence of the seventeenth and eighteenth centuries, and to write its history would be to write that of those sciences.

'Natural law,' says Grotius, 'is the dictate of right reason indicating that any act from its agreement or disagreement with the rational nature of man (*cum ipsa natura rationali*) has in it a moral turpitude or a moral necessity, and consequently that such act is forbidden or commanded by God the author of nature. Acts concerning which there is such a dictate are either obligatory or illicit in themselves, and are therefore understood as necessarily commanded or forbidden by God, and in this respect natural law differs not only from human law but from positive divine law[1].' The exposition, and probably the thought, of Grotius is confused by his use of *jus naturale* as equivalent both to *justitia naturalis* and to *lex naturae*—an inconvenient recurrence to classical usage and departure from the more accurate nomenclature of the Schools—and we must beware of unduly estimating the extent of the advance effected by him who has been called the restorer of the science of natural law. We may trace, however, in his doctrine the tendency already indicated as characteristic of the new era. According to the Scholastic theory hitherto prevalent, the divine command is the sole source of natural obligation, while by Grotius the obligation proceeding from such command is apparently regarded as merely accessory, being superadded to an independent obligation which has its source in the *dictatum rectae rationis*, this dictate being itself the *lex naturae*.

'The law of nature,' says Hobbes, 'that I may define it, is the

[1] De Jure Belli ac Pacis, i. 1. 10. 1.

dictate of right reason conversant about those things which are either to be done or omitted for the constant preservation of life and members as much as in us lies[1].' He sees clearly, however, that this dictate of reason is no law properly so called; he is no adherent of the metaphysical school. 'These dictates of reason men use to call by the name of laws, but improperly, for they are but conclusions or theorems concerning what conduceth to the conservation and defence of themselves; whereas law properly is the word of him that by right hath command over others. But yet if we consider the same theorems as delivered in the word of God that by right commandeth all things, then they are properly called laws[2].' Hobbes, therefore, while admitting the validity of the theological conception, leaves it in the background of his thought; in his formal definition of natural law it does not appear, and to a very large extent he works out his ethical and political system without recourse to it. He is the forerunner, not of the metaphysicians, but of the sceptics who deny that in any proper sense of the term law there is any such thing as natural law at all.

In the system of Kant, the law of nature, or, as he prefers to call it, the moral law[3], appears as the categorical imperative of the practical reason. It is not difficult to recognize under this new disguise the conception already so familiar to us. Law, for Kant as for everyone else, is a command; but he expresses this in his own way by saying that it is 'a proposition which contains a categorical imperative[4].' That the law of nature is the command or dictate of reason was already familiar doctrine in the time of Cicero; Aquinas and the Schoolmen taught it, and from their day to that of Kant himself it had not been rejected or forgotten. Scholastic philosophy, moreover, had already adopted and applied in this connexion the Aristotelian distinction between the speculative and the practical reason—the end of the former being the true, and that of the latter the good. 'Lex,' says Aquinas, 'est quoddam dictamen practicae rationis[5].'

The element of originality in Kant's system is his unreserved acceptance of what I have called the *metaphysical* doctrine of natural law. When Aquinas says that this law is the dictate of the practical reason, he means primarily the reason of God, not of

[1] De Cive, ii. 1. [2] Leviathan, ch. 15.

[3] In strictness of speech, natural law is, in the language of Kant and others, merely one portion of the moral law, that portion namely which declares and enforces natural right in the limited sense, which we shall shortly have occasion to consider. The distinction, however, does not here call for notice. See Hastie's Philosophy of Law (a translation of Kant's Rechtslehre), p. 33.

[4] Hastie, p. 37. [5] Summa, i. 2, q. 91, art. 3.

man—'ratio videlicet gubernativa totius universi in mente divina existens[1].' Human reason is not *per se* possessed of legislative authority, but is merely the secondary source of the law of nature, as being the means by which such law is revealed to man. Kant, however, proclaims a new doctrine of the autonomy of the reason or rational will of man. The human practical reason is a law-giving faculty, and its commands constitute the moral law. 'This law,' he says, '... is the single isolated fact of the practical reason announcing itself as originally legislative. *Sic volo sic jubeo.* Reason is spontaneously practical and gives that universal law which is called the moral law[2].' From this moral or natural law proceeds moral or natural obligation, as most of his predecessors likewise taught. 'Obligation is the necessity of a free action when viewed in relation to a categorical imperative of reason[3].' This legislative action of the practical reason Kant distinguishes as internal legislation, opposing it to that external legislation to which all other species of law are due. All legislation is 'either prescribed *a priori* by mere reason or laid down by the will of another[4].' The theological conception he admits as valid but treats as merely accessory. 'The law which is imposed on us *a priori* and unconditionally by our own reason may also be conceived as proceeding from the will of a supreme lawgiver or the divine will[5].'

To the influence of Bentham and his followers is chiefly due the almost complete discredit into which in England the doctrine of natural law has fallen. Till the days of Kant on the Continent and of Bentham in England, there was no very striking discordance between English and Continental jurisprudence. It is not possible to draw any sharp line of distinction between the teaching of Hobbes, Locke, Cumberland and Blackstone on one side of the Channel, and that of Grotius, Puffendorf, Spinoza, Thomasius and Wolff on the other. All were the inheritors of the same traditions. The acceptance, however, of Kant's metaphysical theory on the one hand, and of Bentham's sceptical theory on the other, established between English and Continental juridical and ethical thought a wall of separation that has not yet been broken down. 'Touching your theory of a law of nature,' says the disciple of the English philosopher, 'so far as its theological interpretation is concerned, it is impossible to say whether there is any such law or not; and if it does exist, there are no means of knowing its

[1] Summa, I. 2, q. 91, art. 1.
[2] Semple's Metaphysic of Ethics (a translation of Kant's ethical and juridical writings), p. 98; third ed.
[3] Hastie, p. 29. [4] Ibid. p. 20. [5] Ibid. p. 37.

contents; we must be content to base our science on a human foundation. And as to the metaphysical form of this doctrine, it is manifest to the meanest understanding that natural law is a mere fiction, a metaphor mistaken for literal truth. Natural right I understand; but as for a natural law by which the observance of such right is commanded and made obligatory—what is it save a delusion and a snare?' Penthamism, then, is a protest against what we may term juridical ethics—the illegitimate infusion into the science of right of conceptions derived from the science of law. The instrument of this infusion is the doctrine of a law of nature, and if this doctrine is seldom encountered in modern English thought under its proper name, its covert influence can still be traced in much of our ethical speculation.

So far we have dealt almost exclusively with one only of the two elements united in the term *jus naturale*. Let us now leave the conception of natural law, and consider the related conception of natural right. There, too, we find a striking discrepancy between English and Continental thought. The English term *right* embraces the whole sphere of good conduct; it includes the practice of all the virtues, and the performance of all duties. The corresponding German terms, *Recht* and *Naturrecht*, on the contrary, include merely one portion of good conduct, the residue being covered by the terms *Tugend*, *Sittlichkeit*, *Moralität*. Similarly, the French *droit* and *droit naturel* are opposed to *moralité*. This distinction between *Recht* and *Moralität*, *droit* and *moralité*, must not for a moment be confounded with our own familiar distinction between law and morals. It is a distinction within the sphere of morals itself. It is current doctrine on the Continent that the science of ethics is capable of a fundamental division into two parts, one of which deals with *le droit*, the other with *la moralité*. The former part of the science is called *jurisprudence* or *Rechtslehre*; the latter, *Morale*, *Tugendlehre*, or *Ethik* (in a narrow sense). Great and manifold have been the efforts made by philosophers to discover and establish the exact nature of this distinction, and, although all agree that it exists, it is impossible to state it in a form that will apply to all the varying accounts that have been given of it. One element in the distinction is, however, common to almost all expositions of it, and by this we shall define it. *Droit* is that part of right conduct which is of such a nature as rightly to admit of external enforcement and constraint; *moralité* is that part which cannot properly be exacted by force, but must be left to the free will of each individual. Now we English know, of course, as well as our neighbours, that every species of right conduct cannot rightly be exacted by force, but we recognize that the question of the

possibility or advisability of such enforcement is one to be decided in accordance with the empirical dictates of expediency in each particular case; that what is enforceable to-day may not be enforceable to-morrow; and that duties enforceable in one way may not be enforceable in another. But Continental thought has striven to lay down some far-reaching general principle, sharply dividing the sphere of right conduct into two parts—a principle from which the enforceability of one of these parts and the non-enforceability of the other may be logically and infallibly deduced.

It can scarcely be doubted that in this difference between English and Continental thought we may trace the influence of that difference between the languages expressing such thought, to which reference was made at the beginning of this essay. The English *right*, being unaffected by any juridical implications, covers the whole field of ethics. But the French *droit*, and the German *Recht*, have both an ethical and a juridical application, and the former is affected and limited by the latter. *Recht*, in the sense of law, covers only a portion of right conduct: that part, namely, which is *actually enforced*. Naturally enough, therefore, *Recht*, in its ethical application (i.e. *Naturrecht*), is similarly restricted, and covers only that portion of right conduct which is *rightly capable of enforcement*. *Recht*, in its ethical sense, is confined to that part of right which is in the most direct relation with *Recht* in its legal sense.

There is no precise equivalent in our language for the expression of this distinction between *droit naturel* and *moralité*, *Naturrecht* and *Sittlichkeit*. We may employ for this purpose, however, the terms justice and virtue. In so doing, we give to the term justice a much more precise and definite signification than that usually possessed by this very vague expression: we shall, however, be historically accurate in making this use of it, for, as we shall see, the distinction with which we are now dealing is historically a product of the mediaeval theory of *justitia*, and, indeed, the French language still uses *droit* and *justice* as synonymous. If we venture to employ the terms jurisprudence and ethics in this connexion, it will be remembered that it is in their Continental and not in their English sense; jurisprudence will mean the science, not of law, but of justice (natural and positive); ethics, the science, not of right conduct in general, but of a particular part of it.

Pertaining to the distinction now under consideration, is that between perfect and imperfect rights and duties. A perfect duty is one belonging to the sphere of justice; it is perfect as admitting of enforcement. An imperfect duty belongs to the sphere of virtue. The former is *Rechtspflicht*, the latter *Tugendpflicht*. Similarly in the

case of rights. According to many writers, however, an imperfect right is not really a right at all, rights being restricted to the department of justice.

The history of this distinction between perfect and imperfect rights and duties, justice and virtue, jurisprudence and ethics, is interesting and instructive, but too long and intricate to be here discussed. Suffice it to say that the first beginnings of the doctrine are traceable in the form given to the Aristotelian theory of justice by the Schoolmen and mediaeval theologians, and that in the writings of Grotius, Puffendorf, Leibnitz, Thomasius, and most of the other founders of modern juridical science, it occupies a more or less important place. It is to the influence of Kant, however, that we must attribute the prominence of the distinction in modern thought, and to his account of it a few words may be profitably devoted. 'Moral philosophy (*Metaphysik der Sitten*),' he says, 'is divisible into two parts: (1) the metaphysical principles of jurisprudence (*Rechtslehre*), and (2) the metaphysical principles of ethics (*Tugendlehre*)[1].' 'Jurisprudence has for its subject-matter the aggregate of all the laws which it is possible to promulgate by external legislation[2].' 'All duties are either duties of justice (*Rechtspflicht*) or duties of virtue (*Tugendpflicht*). The former are such as admit of external legislation; the latter are those for which such legislation is not possible[3].' External legislation is, as we have already seen, that by which one will imposes laws upon another, as opposed to that internal legislation of the autonomous will by which man imposes a law upon himself. To say, then, as Kant does, that jurisprudence deals with those duties which may be promulgated by external legislation, is merely to repeat the already familiar distinction between duties which are, and duties which are not, rightly capable of external enforcement. 'The essential distinction between duties of justice and duties of virtue is, that in the case of the former, external enforcement is morally possible, while the latter must be left to free self-determination[4].' What then are those duties of justice? They are all summed up in the duty of not interfering with the liberty of others. Freedom of external action is the end of all external legislation; and the conditions of such freedom, so far as it depends on the human will, constitute the sphere of justice and the subject-matter of jurisprudence. 'The universal law of justice (*allgemeines Rechtsgesetz*) may then be thus expressed: Act externally in such a manner that the free exercise of thy will may be able to coexist

[1] See Hastie's Philosophy of Law, p. 3. [2] Ibid. p. 43.
[3] Ibid. p. 24. [4] See Semple's Metaphysic of Ethics, p. 198.

with the freedom of all others according to a universal law[1].' The reason why duties of justice, as thus defined, admit of external enforcement, is that such enforcement, being, as Kant says, 'a hindering of a hindrance of freedom,' is consequently in favour of freedom, and therefore just. Hence, 'all justice is accompanied with an implied title or warrant to bring compulsion to bear on any one who may violate it in fact[2].' The law of justice, moreover, looks only to the outward act, and therefore compulsion is possible; while the law of virtue, on the contrary, looks to the motive as well as to the act—no act being virtuous unless done for the sake of virtue—and a man's motives are beyond the reach of compulsion. The precepts of justice are mostly negative—they merely guarantee to each a sphere for the external exercise of his will. The precepts of virtue, on the other hand, know no such limitation.

The foregoing is a typical example of a distinction which, in varying forms, pervades all modern juridical speculation on the Continent, and strikingly differentiates it from the corresponding department of thought amongst ourselves. It would be tedious and unprofitable to examine, in such cursory fashion as space permits, any further instances of the doctrine in question, but I trust that enough has been said to indicate its general nature. A glance at any French or German work on natural law, such as Ahrens's Cours de Droit Naturel or Trendelenburg's Naturrecht auf dem Grunde der Ethik, will reveal the importance attributed to the discovery of the exact nature, limits, and relations of *le droit naturel*.

It remains to say a word touching the relations between *droit naturel* or *Naturrecht* in the sense of natural law, and the same term in the sense of natural justice. There is no necessary connexion between the two doctrines. It is quite possible to accept the theory of a law of nature as opposed to the positive laws of men, without at the same time accepting the doctrine of natural justice as opposed to virtue. And, conversely, we may be strenuous adherents of the distinction between ethics and jurisprudence, and, nevertheless, deny or disregard the existence of a law of nature. This position, indeed, seems to have been already reached by much of modern speculation. The old twofold signification, partly ethical and partly juridical, has largely disappeared in favour of a conception purely ethical, and in many of the theories of *droit naturel* and *Naturrecht* encountered at the present day, there is but little trace remaining of that juridical element which was of old time so prominent. *Lex naturae* has given place to *justitia naturalis*.

[1] Hastie, p. 46. [2] Ibid. p. 47.

The history of doctrine is profitable for little unless it points out to us the way of truth. What conclusion, then, are we to draw touching the validity of these time-honoured conceptions of natural law and natural right? So far as the law of nature is conceived as having its ultimate source in the divine will, criticism of such doctrine pertains of course rather to theology than to ethics or jurisprudence. This aspect of the matter, therefore, we shall here neglect, remarking merely that the validity of the conception of the divine will as legislative admits of adverse argument, even from the standpoint of theology itself[1]. As far as secular science is concerned, the history of the doctrine of natural law is for the most part but a chapter in the history of human error. Not by the aid of any such conception shall we be enabled to read the riddle that has perplexed philosophy from the days of Plato until now—to refute the thesis of Carneades that *summa justitia* is *summa stultitia*, and to prove that the path of righteousness is that of wisdom also. It is time to leave what I have called juridical ethics behind us in the progress of thought, and to realize clearly that the notions of law and obligation pertain, in their full and proper sense, merely to positive right in its various branches, and are, in the sphere of natural right, but mocking and misleading echoes. If we continue to speak of natural law in ethical speculation (and it is probably convenient that we should), we must perform upon that term the same operation that has already been performed upon the natural law of the physicist; that is to say, we must eliminate from it the conception of command and enforcement and the derivative notion of obligation or moral necessity. Natural law must be used by the moral philosopher as meaning nothing more than the principles of natural right; just as the natural law of the physical philosophers has come to mean nothing more than the principles in which are formulated the uniformities of nature. This we may term, in contrast to the theological and metaphysical types of doctrine, the declaratory theory of natural law. A law commanding the right is a fiction; a law declaring the right is a fact; and only so far as this distinction is borne in mind, will much progress be made in ethical speculation.

Turning from natural law to that other doctrine indicated by the term *jus naturale*—the distinction, namely, between justice and virtue, between perfect and imperfect rights and duties, between jurisprudence and ethics—no detailed criticism thereof is here possible. Nor is the matter one of much urgency for Englishmen, for the doctrine is one that in England has never obtained secure

[1] The denial of it constitutes a novel and noteworthy feature in the system of Spinoza.

foothold. At one time, indeed, on the authority of Puffendorf, Thomasius and others, it received from English writers a half-hearted assent. But, although on the Continent it flourished exceedingly, and grew to great credit and influence in the moral sciences, yet in England it was ever an exotic, receiving no support from popular speech, and withering presently away. Curiously enough, however, it has quite recently been regenerated in the writings of Mr. Herbert Spencer, who, in his work on *Justice*, has formulated this doctrine in a manner closely analogous to that adopted by Kant—the conclusions of the English philosopher being, however, as he himself informs us, attained in complete independence of those of his German predecessor. Notwithstanding the credit to be attached to a doctrine that has shown this capacity of resurrection, we may be permitted to doubt its truth, and to consider that, in the rejection of it, English thought has done well. It would seem that in this matter Continental theory has been led astray by the words that have been its instruments, and that, in this department at least of speculative thought, we are in a position to teach our neighbours rather than to learn from them.

JOHN W. SALMOND.

FREEDOM OF CONTRACT IN MORTGAGES.

'IT is a very interesting question, and one which I certainly do not consider as at present finally settled, how far the abolition of the laws against usury has affected the jurisdiction or the extent to which the court will exercise its jurisdiction as between mortgagor and mortgagee[1].'

Ever since the doctrine was established that a mortgage deed was not in reality, what it was and is in form, an absolute conveyance subject to the proviso for reconveyance on the happening at a certain time of a certain event, the Court of Chancery has exercised a 'paternal jurisdiction' in favour of the mortgagor. Before the close of the last century, by a long series of decisions, many of which are to be found in Vernon's reports, it was settled that, whatever might be the form of the document or documents or the nature of the stipulations contained in it or them, if the transaction was in its essence a mortgage or a loan upon security, the borrower was entitled to redeem the property comprised in the mortgage on payment of the principal sum advanced and interest and costs, and that 'a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.' In particular, the following stipulations, either contained in the mortgage deed or made at the time the money was advanced, have been held to be void; that no one but the mortgagor and the heirs male of his body should be admitted to redeem the mortgage[2]; that the right to redeem should be confined to the lifetime of the mortgagor[3]; that unpaid interest should be capitalized and interest paid upon it[4]; that the mortgagee should receive the rents with a commission[5]; that the mortgagor should not pay the mortgage money or institute any proceedings to redeem for twenty years[6]; that the mortgagees who were auctioneers should receive a commission upon the sale of the property[7], &c.

This interference by the courts of equity with the contracts made

[1] *Mainland* v. *Upjohn*, 1889, 41 Ch. D. p. 138, per Kay J.
[2] *Howard* v. *Harris*, 1683, 1 Vernon 190, Lord Keeper North.
[3] *Kilvington* v. *Gardner*, cited in *Howard* v. *Harris*.
[4] *Chambers* v. *Goldwin*, 1804, 9 Ves. 271, 7 R. R. 181, Lord Eldon C.
[5] *Langstaffe* v. *Fenwick*, 1805, 10 Ves. 405, 8 R. R. 8, Grant M.R.
[6] *Cowdry* v. *Day*, 1859, 1 Giff. 316, Stuart V.-C.
[7] *Broad* v. *Selfe*, 1863, 11 W. R. 1036, 9 Jur. N. S. 885, Romilly M.R.

by persons competent to manage their own affairs, under independent advice, and without any trace of undue influence, fraud or pressure, is an exception to the general rule 'modus et conventio vincunt legem.' The late Lord Bramwell spoke as follows in advising the House of Lords in the year 1891. 'There is a further equitable rule which seems to be this, that this right of redemption shall not even by bargain between the debtor and creditor be made more burdensome to the debtor than the original debt, except so far as additional interest and expenses consequent on the debt not having been paid at the time appointed may have occurred or arisen. That any agreement making such right of redemption more burdensome is void . . . As Bowen L.J. says: "Equity will permit of no attempt to clog fetter or impede the borrower's right to redeem and recover what may still remain in equity his own." I cannot understand this. The right of redemption may be sold to any one—to the creditor after the loan. Why may it not be dealt with by debtor and creditor at the time of the loan? It cannot. It seems that a borrower was such a favourite of courts of equity that they would let him break his contract and perhaps, by preventing him from binding himself, prevent him from contracting upon the terms most advantageous to himself[1].' The usury laws were in force when the Court of Chancery assumed the jurisdiction of interfering in favour of the borrower, and it is probable that the Chancellors were of opinion that they were acting in agreement with the policy of the legislature, in limiting the obligations which the mortgagee could impose upon the mortgagor. Stipulations clogging the right of redemption were regarded as devices to obtain more than the legal rate of interest, and as attempts to evade the spirit of the laws against usury. Lord Eldon in *Chambers* v. *Goldwin*[2] and Lord Romilly in *Broad* v. *Selfe*[3] trace the exercise of the jurisdiction to this source.

The usury laws were curtly abolished by 17 & 18 Vict. c. 90. 'The several acts and parts of acts mentioned in the schedule hereto and all the existing laws against usury shall be repealed.' It is now legal for the lender to exact from the necessitous borrower the payment of an extravagant rate of interest. The foundation of the 'paternal jurisdiction' being thus removed, it would seem right that the judges should cease to interfere with the contracts made by borrowers and lenders of money upon the security of immoveable property. 'Cessante ratione cessat et ipsa lex.'

[1] *Marquess of Northampton* v. *Salt*, '92, A. C. p. 19.

[2] 1804, 9 Ves. 254, Lord Eldon said, 'There is nothing unfair or perhaps illegal in taking a covenant originally that if interest be not paid at the end of the year it shall be converted into principal. But this court will not permit that as tending to usury, though it is not usury,' p. 271.

[3] 1863, 11 W. R. 1036.

In all other transactions except those by way of mortgage the tendency of the courts at the present day is first to discover what contract the parties intended to make, and then, in the absence of the recognized grounds of defence (mistake, fraud, duress, &c.), to hold them to that contract, however unreasonable or improvident one or other of its terms may be. The late Lord Bramwell declared that he could not understand why a different rule should be applied to the contract of mortgage. What principle of abstract justice is violated if the mortgagee exacts as part of the price of the loan, and the mortgagor agrees to, one or other of the stipulations which have been held to be void as clogging or fettering the equity of redemption? If the mortgagor is unwilling to accept the terms offered by the mortgagee he can decline the contract and attempt to obtain the loan elsewhere.

An examination of the cases will show how far since the repeal of the usury laws the judges have shown any inclination to modify the rule settled by the more ancient cases.

In *Potter* v. *Edwards*[1] the suit was instituted for the redemption of a mortgage executed in 1855 to secure £1000 and interest at 5 per cent. The receipt was signed for £1000, but in fact the plaintiff only received £700. The plaintiff tendered £700 to the defendant, but the latter refused to be redeemed except on payment of the full sum of £1000. The defendant stated in his answer and proved by evidence that he had been very unwilling to make the loan upon the proposed security, but upon being pressed with great importunity to do so he had offered to advance £700 only upon the terms of having a mortgage for £1000, the balance of £300 being a bonus proportionate to the risk. Kindersley V.-C. gave judgment for the defendant. 'The deed appears to me to be exactly what the parties intended it to be, that is a security for £1000 upon having an advance of £700. It is true that in an ordinary case where there is a mortgage for £1000, and it is proved that £700 only has been advanced, the Court will allow it to stand for £700 only, but in this case there is uncontradicted evidence of an arrangement to a different effect.'

In *Broad* v. *Selfe*[2] the mortgagees were auctioneers. The mortgage deed, which was executed after the repeal of the usury laws, contained a stipulation that the mortgagees might, if the property were sold, retain out of the proceeds of sale a commission of 5 per cent. on the amount realized, and that if the mortgagor paid off the debt the mortgagees should receive a commission of 5 per cent. on the value of the property. The Master of the Rolls held this stipulation to be void. 'The contract in this case was only a contract of

[1] 1857, 26 L. J. N. S. Ch. 468.

[2] 1863, 11 W. R. 1036.

mortgage to the extent of £200 and interest, but not beyond this. —The cases referred to, and several others which I have consulted, show the principle that the court would not permit a person under the colour of a mortgage to obtain a collateral advantage not belonging to or appurtenant to the contract of mortgage. Although this principle in its origin probably had reference to the usury laws, it went in my opinion beyond them, and is not affected by their repeal.' That is an emphatic statement that a stipulation for a collateral advantage is not permitted, notwithstanding the repeal of the usury laws.

Stuart V.-C. in *Barrett* v. *Hartley*[1] decided that certain sums charged in the accounts by a mortgagee in possession, by way of bonus for valuable services rendered to the mortgagors, must be disallowed on the grounds that the mortgagee was also a trustee, and that there was evidence 'of circumstances of pressure and difficulty' on the part of the plaintiffs, which had caused them to consent to the charges at the time they were made. On the question discussed in this paper the Vice-Chancellor spoke as follows: 'Cases have been referred to in which with reference to the law of mortgagor and mortgagee, when the usury laws existed, where there was a clear and decided contract for a loan at a certain rate of interest, the Court would not permit a mortgagee to obtain a collateral advantage under the shape of commission for collecting rents, or of a bonus, or by whatever other name it might be called, from the mortgagor, or anything beyond the terms of the contract. Nor even under the contract when it was an exaction beyond that limit which the court would permit. It is perfectly true that such cases were cases when the usury laws were in existence, and when it was said that such bargains by a mortgagee for some advantage beyond the legal interest stipulated for in the deed would be a cloak for usury.' The last words imply that in the opinion of the Vice-Chancellor the repeal of the usury laws would enable the court to declare valid stipulations which previous thereto would have been held void as a 'cloak for usury.'

In *Clarkson* v. *Henderson*[2] by a mortgage executed in 1865, the tenant for life and the remaindermen assigned certain property to secure repayment of £872 and interest, with a proviso that interest in arrear more than twenty-one days should be capitalized and bear interest after the same rate. The question was discussed whether the mortgagees were entitled to capitalize the interest under this proviso. It was contended for the mortgagors that 'it was against the policy of the law for a mortgagor to enter into such a covenant for capitalizing interest in arrear; it was so before the abolition of

[1] 1866, L. R. 2 Eq. 785.

[2] 1880, 14 Ch. D. 348.

the usury laws, and the repeal of those laws has made no difference in this respect.' But Hall V.-C. held without any difficulty that the security given by the mortgagors for compound interest was good.

In the early part of 1889 Kay J. delivered two judgments dealing with the point now discussed, which show clearly that at that time he had come to no settled conclusion and that he considered the question open for discussion. In the first case *James* v. *Kerr*[1] the plaintiff desired to establish his claim to an interest in the real estate of an intestate. Being without funds he borrowed money from the defendants, his solicitors, and in 1884 executed a mortgage whereby he covenanted to repay the money advanced, and agreed to pay the defendants £225 by way of bonus if by any means his title to any part of the real estate should be established, and he charged his interest in the real estate with the advances, interest thereon, and the bonus of £225. The plaintiff succeeded in establishing his claim to the real estate, and now claimed to redeem the same upon payment of the money actually advanced and interest thereon, and he asked for a declaration that the agreement to pay the bonus was void. Kay J. held (1) that the mortgage was tainted with champerty, (2) that the agreement to pay the bonus was an illegal advantage stipulated for by the mortgagee, and (3) that the transaction was voidable as an undue advantage obtained from the plaintiff while he was in the position of an expectant heir. On the second point the learned judge quoted the case of *Broad* v. *Selfe*[2] and said, 'I believe with Lord Romilly that the rule that a mortgagee should not be allowed to stipulate for a collateral advantage beyond his principal and interest did not depend upon the laws against usury. Considering how completely the mortgagor is in the power of the mortgagee, and the great facilities which courts of equity have always given for the recovery of the loan and the realization of the security, I think it is important to preserve the simplicity of the mortgage transaction and not to clog the redemption by stipulations of this kind. It seems to me inexpedient and I should regret that the old rule should be altered.' This judgment was delivered on January 14, 1889, and it will be noticed that the defendants were solicitors dealing with their client, that on the first and third points discussed in the case the learned judge was in favour of the plaintiff, that on the merits the defendants could not contend with success that the parties had contracted on equal terms, and that *Potter* v. *Edwards*[3] was not cited. However this may be, three weeks afterwards on February 5, 1889, *Mainland* v. *Upjohn*[4] stood for judgment before the same learned judge. In the

[1] 1889, 40 Ch. D. 449.
[2] 1863, 11 W. R. 1036.
[3] 1867, 26 L. J. N. S. 468.
[4] 1889, 41 Ch. D. 126.

latter case the defendant, a young solicitor, had advanced money to the plaintiff, an experienced builder, upon securities of a speculative character. At the time of the loans, money had been deducted by way of bonus from the amounts stated in the mortgage deeds and retained by the lender. The Court held that sums actually deducted at the time of the loan by way of commission or bonus must be allowed to the mortgagee in taking the redemption accounts. *Potter* v. *Edwards* [1] was cited and influenced the decision. Kay J. said, 'If the mortgagor has been deceived or is taken by surprise, or there has been any oppression or improper dealing in the matter, there is ample equity of course to set it right on that ground; but if both parties know previously what they are doing, and this is voluntarily done and in pursuance of a deliberate bargain, how a mortgagor can possibly say to a mortgagee, "Pay that money back to me," I cannot conceive. It is impossible. The money can only be recovered when it has been paid over under a mistake of fact or under some pressure—some advantage taken of the payer which disentitles the payee to retain the money. But where no such advantage has been taken, where there has been no such improper pressure, if the parties are on equal terms, all I can say is that the money in such a case as that must be treated as having been actually paid by the mortgagor to the mortgagee as an inducement to lend the rest of the amount: and then I conceive the mortgagor has no right to recover it, nor has he any right to complain that the whole amount is charged against him in the mortgage deed.' The learned judge found as a fact that having regard to the mortgagor's long experience in transactions relating to building loans, and the mortgagee's youth and comparative inexperience in such matters, it was clear that the mortgagor was perfectly able to take care of himself, and that the case was in no sense one of oppression, unfair dealing, or imposition, on the part of a mortgagee.

In the result it is submitted that there is no real opposition in the judgments in *James* v. *Kerr* [2] and *Mainland* v. *Upjohn* [3], and that the combined effect of the two cases may be thus expressed: since the repeal of the usury laws, the Court ought to examine carefully agreements between mortgagor and mortgagee whereby the equity of redemption is clogged or fettered by any agreement securing a collateral advantage to the mortgagee; but if a careful examination of the facts leads to the conclusion that the parties have contracted on equal terms, and that there is no evidence of 'oppression, unfair dealing, or imposition on the part of the mortgagee,' the Court ought to enforce the contract, however unwise and improvident it may be, deliberately entered into by mortgagor

[1] 1867, 26 L. J. N. S. Ch. 468. [2] 1889, 40 Ch. D. 449. [3] 1889, 41 Ch. D. 126.

and mortgagee in the same way and to the same extent as the Court is accustomed to enforce contracts made by persons who are not in the position of mortgagor and mortgagee.

The last case to which it is necessary to refer is the *Marquess of Northampton* v. *Pollock*[1]. Lord Compton, the son of the plaintiff in the action, borrowed £10,000 from the defendants, and as security for the loan he executed a bond and covenanted to repay the loan with interest, and charged his reversionary interest in real estate to which he was entitled on the death of his father with the repayment of the money. This security would be worthless if Lord Compton predeceased his father, and therefore the parties agreed in writing that the lenders should insure the life of the borrower against that of his father for the sum of £34,500: the premiums payable in respect of the policy were to be paid in the first instance by the lenders, but were to be charged in the accounts against the borrower, and it was provided that, in the event of the borrower predeceasing his father without having repaid to the lenders the sums due in respect of the loan, the policy and all moneys secured thereby should be the property of the lenders. This event happened. The borrower received the sum of £10,000, the policy was taken out by the lenders, the borrower made no payment in respect of interest on the sum borrowed or of the premiums on the policy, and died in the lifetime of his father. The latter as administrator of his son brought this action against the lenders, alleging that the transaction was in its essence a mortgage, and claiming that he was entitled to redeem the policy on payment to the lenders of what should appear to be due to them on taking the accounts as between mortgagor and mortgagee, and that the provision that in a certain event (which happened) the policy was to be the property of the lenders was void as an 'agreement limiting the mortgagor's right of redemption to his lifetime.' In the Court of Appeal and in the House of Lords the lenders had the assistance of Lord Davey and Rigby L.J., and the principal point argued by those eminent counsel was that an accurate analysis of the facts of the case and of the documents showed that the transaction was not one of mortgage, and that the doctrine that an agreement limiting the mortgagor's right of redemption was void was not applicable. With this view the late Lord Bowen in the Court of Appeal, and the late Lord Hannen in the House of Lords agreed, but the majority in both courts held otherwise. But it is worthy of note, though it tells against the argument presented in this paper, that Lord Davey and Rigby L.J. did not think it worth while to argue with persistence before the Court of Appeal that the equitable

[1] 1890, 45 Ch. D. 190; '92, A. C. 1.

doctrine as to the right of the mortgagor to redeem was in any way shaken by previous decisions. In the Court of Appeal Cotton L.J. said, 'I need not quote authorities that courts of equity never will allow the equity of redemption to be cut off except by force of time or the order of the Court. The mortgagor must be foreclosed if he does not redeem.' And Lindley L.J. added, 'The attempt to confine the right to redeem the policy in point of time is, I think, opposed in principle to a long series of authorities which I am not at liberty to question.' In the House of Lords the latter part of the argument of the counsel for the appellants is directed to the point here discussed, and *Newcomb* v. *Benham*[1] was cited. In that case lands were conveyed to be redeemable upon payment by the grantor of £1,000, and interest at any time during his lifetime, with a covenant by the grantor that in case the lands should not be redeemed in his lifetime they should never be redeemed. The Lord Keeper North reversed the decision of the Earl of Nottingham and held that this covenant was valid, basing his decision on evidence which proved that 'the grantor intended a benefit and kindness to the mortgagee in case he should not think fit to redeem this estate in his lifetime.' The House of Lords affirmed this decision, but the case is in direct opposition to a long series of cases decided before the repeal of the usury laws, and is interesting as showing that the equitable doctrine here discussed was not adopted without difficulty as a hard and fast rule applicable to all cases of mortgage, rather than as an authority against the doctrine itself. In the course of his judgment in the Marquess of Northampton's case[2], Lord Selborne said, 'I am not prepared to hold that if it were made out that the policy was effected for the creditors' benefit subject only to an option for the debtor to acquire a right in it by making a payment which he never made, the obligation of paying the premiums which the debtor certainly undertook would have made it the property of the debtor contrary to the contract. I see no principle on which I ought so to hold since the repeal of the usury laws, and in the absence of any allegation or proof of fraud, oppression, or other unfair dealing.' Lord Bramwell used the expressions quoted on a previous page, and at the end of his judgment in favour of the plaintiff in the action said, 'I regret to have to come to this decision. I think the equitable rule unreasonable, and I regret to have to disregard the express agreement of a man perfectly competent and advised by competent advisers.' The effect of this decision was that though neither Lord Compton nor the Marquess of Northampton ever paid a penny to the defendants, the former obtained from the defendants the sum of

[1] 1684, 1 Vern. 232; 2 Ventr. 384.

[2] '92, A. C. 1.

£10,000, and the latter obtained from the defendants the difference between the amounts due from Lord Compton's estate in respect of the loan of £10,000 plus the premiums on the policy and the sum of £34,500.

In the result since the repeal of the usury laws, there are on one side of the line in favour of freedom of contract between mortgagor and mortgagee the judgments of Kindersley V.-C. in *Potter* v. *Edwards*[1], of Stuart V.-C. in *Barrett* v. *Hartley*[2], of Hall V.-C. in *Clarkson* v. *Henderson*[3], and of Kay J. in *Mainland* v. *Upjohn*[4], and the remarks of Lord Bramwell in the *Marquess of Northampton* v. *Salt*[5]; and on the other side of the line the decisions of Lord Romilly M.R. in *Broad* v. *Selfe*[6], of Kay J. in *James* v. *Kerr*[7], and of all the courts in the *Marquess of Northampton* v. *Salt*[8], that a conveyance by way of mortgage subject to a limited right of redemption is as impossible now as it was in the last century, and that the creditor will not be allowed to impose terms on the debtor other than those characteristic of and essential to the contract of mortgage.

Lord Davey in his argument for the mortgagee in *Mainland* v. *Upjohn*[9] pointed out with great force that in the more modern cases, in which the ancient doctrine against clogging the equity of redemption with any by-agreement had been applied, there had been 'some independent and distinct ground of equity arising out of the relation of the parties': thus in *Broad* v. *Selfe*[10] the mortgagees were auctioneers, in *Barrett* v. *Hartley*[11] the mortgagee was in possession and there was evidence of pressure on the mortgagor, and in *Cowdry* v. *Day*[12], *Eyre* v. *Hughes*[13], *James* v. *Kerr*[14], and *Field* v. *Hopkins*[15] the mortgagee was the solicitor who had prepared the mortgage deed. It must be admitted that no such circumstance was present in the *Marquess of Northampton* v. *Salt*[16], and the remarks of Cotton and Lindley L.JJ. are a strong authority that the old doctrine is still in full force.

Different minds will come to different conclusions on the question whether perfect freedom of contract should be allowed to mortgagor and mortgagee. But it is worthy of remark that, inasmuch as there is no legal limit to the rate of interest to be charged upon the loan, the mortgagee can in many cases, by exacting an excessive rate of interest, obtain the same result that would follow from an agreement to pay a moderate rate of interest and a stipulation

[1] 1867, 26 L. J. N. S. Ch. 468.
[2] 1880, 14 Ch. D. 348.
[3] '92, A. C. 1.
[4] 1889, 40 Ch. D. 449.
[5] 1889, 41 Ch. D. 126.
[6] 1866, L. R. 2 Eq. 785.
[7] 1876, 2 Ch. D. 148.
[8] 1890, 44 Ch. D. 524.
[9] 1866, L. R. 2 Eq. 785.
[10] 1889, 41 Ch. D. 126.
[11] 1863, 11 W. R. 1036.
[12] 1859, 1 Giff. 316.
[13] 1889, 40 Ch. D. 449.
[14] 1890, 45 Ch. D. 190; '92, A. C. 1.
[15] 1863, 11 W. R. 1036.
[16] 1890, 45 Ch. D. 190; '92, A. C. 1.

for the payment of bonus, commission or compound interest. This is expressed clearly in the argument of Lord Davey in *Mainland* v. *Upjohn*[1] and by Lord Bramwell in the *Marquess of Northampton* v. *Salt*[2]. The latter said with reference to the facts in that case, 'Equity allows itself to be circumvented when it interferes with people's bargains. What Lord Compton has been charged is about 10 per cent. on the sum borrowed with compound interest. I suppose at his death the sum due from him was about £20,000. If he had agreed to pay the £10,000 and 10 per cent. interest, and there had been no agreement to insure, the appellants would have laid out half the annual amount for insurance, and on his death kept the sums insured. Can they be considered to have done that or its equivalent? The resulting figures would have been the same. I think not. The rules of equity may be evaded but must not be infringed[3].' That is to say, if the appellants in that case had received better advice, the contract would have been drawn in such a form that, in accordance with the intention of the contracting parties, they would have been entitled to retain the money which, contrary to that intention, the plaintiff in the action claimed from them with success.

It is the general habit of the courts at the present time to go behind the form of the documents, and to decide the rights and liabilities of the parties according to their real intentions. If the mortgagee by moulding the form of that part of the contract dealing with the payment of interest with a due regard to the existence of the rule that the right to redeem cannot be clogged or fettered by any by-agreement, can impose the same liability on the mortgagor that would be imposed by exacting from the latter an agreement in the ordinary form to pay a moderate and usual rate of interest, and in addition a stipulation for some collateral advantage by way of bonus, commission, or compound interest, or some limitation of the right to redeem, is it worth while to insist on the continued application of a rule which can be evaded by the skilful and ingenious, and cannot operate except by defeating the intention of the parties to the contract?

ERNEST C. C. FIRTH.

[1] 1889, 41 Ch. D. 126.
[2] '92, A. C. 1.
[3] The equitable rule forbidding the increase of the rate of interest in case of unpunctual payment of the interest is systematically evaded by the practice of the mortgagor agreeing to pay the higher rate, with a proviso that a lower rate will be accepted if the payments be made punctually on the day appointed.

LANDHOLDING IN COLONIAL NORTH CAROLINA.

IN 1663 His Majesty Charles II, out of the abundance of his American lands, granted the province of Carolina to eight of the chief nobles of his court. These gentlemen retained the property until 1729, when they sold it to the King. Here it remained until the War of the Revolution. Although these two supremacies, the one of the Lords Proprietors and the other of the King, represent two distinct periods in the history of the colony, they indicate but little interruption in the history of its private law. This is especially true of the law relating to land. The basis for the future government was the charter by which the Lords Proprietors received their property. When the purchase by the King was made, there was no beginning the government *de novo*. The Crown simply stepped into the place vacated by the former owners. Proprietary laws were for the most part confirmed or but slightly altered. We thus see the importance of the charter of 1663, and can understand why the people in their periodic revisions of the laws saw fit to insert this instrument as a preface to their codes. It is therefore from this charter[1] that we begin to trace the history of landholding in North Carolina.

Three facts relating to land stand prominently out in the royal charter. 1. Carolina was constituted a feudal seigniory, the Proprietors being authorized 'to have, hold, use, exercise, and enjoy the same [their privileges], as amply, fully, and in as ample manner, as any Bishop of Durham, in our kingdom of England, ever heretofore had, held, used, or enjoyed, or of right ought or could have use or enjoy.' 2. The Lords were to hold their lands 'in free and common socage and not *in capite*, or by knight's service.' 3. They were to hold 'as of our manor of East Greenwich in Kent,' and to pay an annual rent of twenty marks, together with one-fourth of all gold and silver ore found within that region. This rent was a mere formality intended for a recognition of the King's ultimate dominion over the granted lands; still it is well to remember that it was eventually paid. At the time of the sale

[1] The first charter was issued in 1663. In order to include a strip of territory to the north of the province, a second charter was issued in 1665. Except as to boundaries it differs in no material sense from the charter of 1663, but being the later it may be considered the more authentic. We have therefore used it.

the Proprietors owed rent for seven and a half years, and that amount was deducted from the purchase price [1].

The charter [2] also prescribed the relation between the Proprietors and their future tenants. The Lords, so we read, may at pleasure 'assign, alien, grant, demise, or enfeoff, the premises or any part, or parcel thereof, to him or them that shall be willing to purchase the same, and to such person or persons as they [the grantees] shall think fit, to have and to hold to them, the said person or persons, their heirs or assigns, in fee simple or in fee tail, or for terms of life, lives, or years; to be held of them [the Lords Proprietors] and not of us, our heirs and successors.' This grant involved a return to subinfeudation, and accordingly the King relaxed for the benefit of the Proprietors the statute *Quia Emptores*. To them also was accorded the right to erect seigniories and manors with the accompanying privileges of courts leet and barons. By way of being sufficiently explicit, the people who should settle in the colony were granted the right to hold their land on the above conditions, and were guaranteed the recognized personal and property rights of Englishmen.

The above-mentioned provisions represent one element in the development of the colonial land laws. That was the superimposed factor. It came from without. As it embodied the distinctive ideas of the promoters of the enterprise it may be called the Proprietors', or the King's, contribution to the process of growth which was about to begin. There was another factor, one due to the conditions of life in the colony. As this was interpreted and demanded by the people it may be termed the popular contribution to the same process. These two factors were brought to bear on the English Common Law which the colonists may be considered to have carried with them across the Atlantic. The charter had granted to the Assembly the right to make laws 'consonant to reason and as near as may be to the laws of England.' As more distinctively American conditions arose it was a question as to where the Common Law stopped and where the colonial law began. Confusion arose, and in 1711 the North Carolina Assembly was impelled to declare, not only that the Common Law was binding in the colony, but that all English statutes, especially those confirming inheritances and titles of land, should be enforced [3]. This was not sufficient. In 1749 the Assembly by law declared which of the statutes of England should be recognized in the colonial Courts [4]. So decidedly did the law swing away from its original mooring that in 1775 it was well out in

[1] Cf. Colonial Records of North Carolina, vol. ii. p. 723.
[2] The charter may be found in Col. Records of N. C. vol. i. p. 102.
[3] Col. Recs. of N. C. vol. i. p. 789.
[4] See the Revision of 1752.

the stream of a new development. It shall be our task to take up and explain the new features of the law relating to land as they came into existence in the colony.

Quit Rents. The most notable kind of landed estates in North Carolina, as in all the southern colonies, was the fee-simple estate held subject to quit rents [1]. It was due to two facts: (1) the inability of the settlers to pay for their lands at once, and (2) the desire of the Proprietors to retain the rent as an acknowledgment of tenure between themselves and their tenants. The latter is shown by the later practice in the Proprietary Period of selling land outright while a very small quit rent was retained 'as an acknowledgment [2].'

The use of quit rents was retained throughout the Proprietary and Royal Periods, but it is doubtful if they were ever even fairly well collected. Yet in the Proprietary Period the amounts received from this source were considerable [3]. At two different times Thomas Lowndes alleged that the quit rents were sufficient to defray the ordinary expenses of the government [4]. Governor Burrington, however, does not corroborate this statement [5]. The long contest over the manner of paying quit rents, which was waged by the Assembly against Governors Burrington and Johnston, reduced the revenues from this source to a small sum. It was also difficult to collect them. The chief trouble was to get a correct rent roll. The basis of this roll ought to have been the records of the original grants and of the transfer of land between individuals. These records, however, were so carelessly kept that they could not be used for the purpose indicated. Several attempts were made to secure a general registration, but we have no evidence that any one of them was successful [6].

Another source of trouble was the medium in which quit rents were paid. In early times the Assembly arranged a table of

[1] Mr. Justin Winsor falls into the error of saying: 'The efforts to colonize the seaboard region of North Carolina without giving the fee of the land to the people and without care in the selection of colonists, resulted in a failure even more complete than that of the Canadian colonists' (Narrative and Crit. Hist. vol. iv. p. xxii). If it were not true that lands held subject to quit rents are held in fee simple (cf. Williams, On Real Property, p. 124), it would still be necessary, in order to show the fallacy of this statement, only to remind the reader that lands were held in North Carolina in exactly the same manner as in Virginia and in South Carolina, and that these two colonies were eminently prosperous. We are of the opinion that poor harbours and a consequent lack of direct trade with Europe had far more to do with the slow growth of North Carolina than the prevalence of quit rents there.

[2] See Col. Recs. of N. C. i. pp. 383, 392, and ii. p. 58.

[3] Ibid. ii. p. 169.

[4] Ibid. iii. pp. 11, 49.

[5] Ibid. iii. p. 149.

[6] See ibid. ii. 34-5, and iii. 144. Also Revision of 1752, pp. 275-77, and ibid. p. 280. [N.B. We refer to the Colonial Codes as 'Revisions.' They occurred in 1751 & 2, 1765, and 1773. The laws of 1715 were a revision, but as they were never printed as such they appear in later Codes as original laws.]

valuation by which certain products, called on this account 'rated commodities,' were to pass as currency. In these, quit rents were paid[1]. About 1715 the Assembly made these rents payable in colonial paper currency, then much depreciated[2]. To this scheme the Proprietors objected so emphatically that we find no further mention of it until the royal regime. Burrington, the first royal Governor, acting under instructions, brought in a Bill requiring payment in proclamation money. The Assembly demanded that the provincial money should be received also. Each party remained obstinate and the Governor prorogued the Assembly[3]; but that body continuing its demand was alternately prorogued and adjourned until when Burrington was removed from office in 1734 it had passed no Bill on this subject.

The dispute was passed on to Johnston, the next Governor, who at first succeeded no better than his predecessor. After fourteen years of contention this Governor, by heroically suppressing some of the counties and their delegations, managed to pass a quit-rent law that was in conformity with his instructions[4]. Three years later Johnston died in office, and early in the term of his successor the quit-rent law was repealed[5]. A new law passed in 1752 seems never to have gone into operation[6]. In the meantime, the small amount of quit rents that was paid seems to have been paid in rated commodities[7].

Closely connected with the above discussion was another about the place for receiving quit rents. In early times they were paid on the farms of the inhabitants, and although Tynte[8], and perhaps other Governors, were directed to collect them at specific places, they continued to be paid as formerly. Burrington tried to make the same change but failed[9]. In 1735 Governor Johnston, after also failing to get such a Bill passed through the Assembly, settled the matter by proclamation, and thereafter the few who chose or were compelled to pay quit rents took them to certain designated places[10].

The rate of quit rents varied. In the earliest grants it followed the Virginia custom, which was one shilling for each fifty acres. The Proprietors were inclined to put it at a higher figure, but the Assembly petitioned against this, and the Lords agreed in 1668 that henceforth the inhabitants of Albemarle should hold their land on the same conditions on which land was held in Virginia[11]. This

[1] Col. Recs. of N. C. iv. 920, and iii. 144.
[2] Ibid. iii. 95.
[3] Ibid. iii. 143.
[4] Ibid. iv. p. xviii, and Revision of 1752.
[5] Revision of 1773, p. 123.
[6] Revision of 1773, p. 167.
[7] Col. Recs. iv. 920.
[8] Appointed Governor in 1708. Ibid. i. 694.
[9] Ibid. iii. p. vi.
[10] Ibid. iv. pp. xiv-xvi.
[11] Ibid. i. 175.

concession was known afterwards as 'the Great Deed of Grant,' and was most carefully preserved. Throughout the colonial period it was considered the fountain of landed rights. Although the Proprietors continually ignored it, the settlers always appealed to it, and in 1731 all the people claimed to hold under it [1].

Escheat and Forfeiture. By their grant the Proprietors had the incidents of escheat and forfeiture as well as the minor rights of wreckage, wastes, fisheries, &c. These are the only survivals of the older feudal incidents in the colonial laws.

Land was granted on condition that it should be properly 'seated' within three years [2]. In 1722 it was held that this was done when the grantee had built a house on, and had cultivated one acre of, each tract granted. The Governor and Council decided whether or not this had been done, and the minutes of this body show that a large part of its business was hearing petitions to declare older grants forfeited and to issue new grants for the same.

Land escheated as under the Common Law on failure of heirs and for conviction of felony, treason, or *felo de se* [3]. We find but slight mention of the latter cause, most escheats being for failure of heirs, which was held to have occurred when there were no heirs in the province [4]. Like its English model, the County Palatine of Durham, North Carolina had an Escheator with various local deputies. His duty was restricted to deciding whether or not the deceased had heirs [5]. This he accomplished with the assistance of a jury of twelve men, whose verdict he communicated to the Council. Escheatable lands reverted immediately on the death of an intestate holder without heirs. This was important, because the person in actual possession at the moment of escheat might make composition for the land at twopence an acre [6]. The relatives of the deceased holder who were not heirs were given a preference in taking the escheated land on the payment of the composition money. The following was the order as established by the Assembly: the widow or the widower; the father; the mother; the eldest half-brother; the half-sister or half-sisters, each sharing alike; the nearest of kin; and finally the nearest person who should petition for it [7]. The composition money was all that was paid to secure the land, 'be the improvement more or less.' Heirs to land that had been escheated for seven years were debarred from suing to recover the same.

By the royal charter the Proprietors were granted the privileges

[1] Col. Recs. iii. 144.
[2] Cf. the Virginian grants, ibid. i. 59–67, and also ibid. iii. 148.
[3] Ibid. i. 453. [4] Ibid. ii. 317, 323, 305. [5] Ibid. ii. 305.
[6] Ibid. ii. 451, 452. [7] Laws of 1715, ch. 30; see Revision of 1752, pp. 11, 12.

of mines—for which they were to pay one-fifth of all gold and silver ore—together with the right to wrecks, fisheries, chases, &c. At first they reserved mines for themselves [1], but by 1712 they were granting them to individuals for a share of the minerals taken out [2]. The privileges of hunting, fishing, and hawking they readily granted with the land. They also established wreckers whose duty it was to recover 'all wrecks, ambergrice, and other ejections of the sea [3].' This office is mentioned in the early correspondence only, and it is probable that it was soon abandoned.

Conditions of granting Land. In 1663 the land held by the whites in North Carolina was claimed either by purchase from the Indians [4] or by grant from Virginia [5]. The Proprietors recognized the latter grants since they were settled according to the usual Virginia allotment, but because the former were large and irregular tracts it was thought that they ought to be reduced to the conditions of the regular allotments. After thus stating their opinions they left Sir William Berkeley, then Governor of Virginia and one of the Proprietors, to settle the matter as he saw fit [6]. We hear nothing directly from Berkeley, but we have evidence that in each case holders were compelled to take out new patents [7].

The lands first taken were always those along the rivers, insomuch that it has been remarked that the early history of the colony was but the story of a 'search for bottom land.' The Proprietors tried to regulate this demand by saying how much of a grant should lie on a stream. In the Royal Period the King tried to secure a similar result, by directing that of a land grant the side lying on the river should not be more than a fourth of the side at right angles to it.

In 1665 the Proprietors made their first formal proposals to settlers. They offered to each free man who had already come into Albemarle County [8] eighty acres of land for himself and, if married, eighty acres for his wife. A free woman who had arrived with a servant was to have a like amount. For each able-bodied man-servant, armed and victualled for six months, the master or mistress was to have eighty acres, and for each weaker servant, 'as women, children, and slaves' above fourteen years, forty acres. Every Christian servant was promised forty acres at the expiration of the period of servitude. Those who should arrive in the next three years were respectively to have sixty and thirty acres instead of eighty and forty. Those arriving in

[1] Col. Recs. i. 183, 237.
[2] Ibid. i. 847.
[3] Ibid. i. 240.
[4] Ibid. i. 19.
[5] Ibid. i. 17, and 59–67.
[6] Ibid. i. 53, 54.
[7] Ibid. i. 253, 270.
[8] Albemarle County lay in the north-east corner of the present State, and was the separate Government out of which the later colony grew.

the year 1668 were to have just half as much as those who had already settled there[1]. These amounts were repeated with slight variation in the instructions to Governors until 1684 and perhaps still later, but it is possible that they were not put into practice. In 1694 it was the custom to grant fifty acres to each person brought in without regard to sex or condition. This was in imitation of the Virginia custom with which it was identical. At any rate, from 1694 'proving a right' meant in the colony taking up fifty acres of land for importing one person[2].

Abuses at times crept into the land office. One of these was allowing a man to prove a right for each time he had come into the country. One James Minge proved on one occasion six rights for himself and four for his negro Robin[3]. To remedy this evil the Council ordered in 1712 that thenceforth a man could prove but one importation for one person[4]. Another abuse was in surveying improperly. In 1729 Maurice Moore received a tract whose survey called for 1,000 acres. Twenty years later it was resurveyed and found to contain 3,834 acres[5]. Against this there was a law on the statute-books as early as 1715, and as late as 1752, which provided that if a man suspected his estate to contain more land than his survey specified he might have it resurveyed, and if the surplus were greater than one-tenth of the whole he should either forfeit the same or take out a patent for it[6]. This, however, was a rather lame remedy, inasmuch as it left the initiative to come from the holder[7].

The right to receive land for importations could be proved either before the Council, the General Court, or the Precinct Courts. As the province became more extensively settled it was left almost entirely to the last-mentioned body. This condition, however, was reversed in the Royal Period, where we find it almost entirely in the hands of the Council, called for this purpose the Court of Claims.

A noticeable fact in the history of landholding in North Carolina was the usual smallness of the estates. Large estates would scatter the population and consequently would endanger the existence of a young colony. The people understood this, and one of their earliest laws—confirmed by the Proprietors in 1670—declared that no surveyor should lay out for one person more than 660 acres 'in one devidend,' unless the person had special permission from the Lords[8]. This law was to expire in five years, but its spirit continued. Early in the next century the Proprietors limited all

[1] Col. Recs. i. 81, 88.
[2] Ibid. iii. 424, 426.
[3] Ibid. i. 635.
[4] Ibid. i. 865.
[5] Ibid. iv. 765, 1012.
[6] Revision of 1752, p. 10 (Laws of 1715, ch. 29).
[7] Col. Recs. iii. 184.
[8] Ibid. i. 186.

ordinary sales to 640 acres in one tract [1], and the royal governors were instructed to the same end [2]. Larger grants were occasionally met with, but these rarely held over three or four thousand acres. To this there is one exception. In 1737 Murray Crymble and others secured a grant of 1,200,000 acres on which they obligated to settle within ten years one white person for each one hundred acres. The enterprise was hardly a success. When it was finally closed up much more than half of the land lapsed to the Crown, and the remainder was left in the hands of small holders. The whole affair was a speculation and left no impression on the land system [3].

When the King purchased Carolina one of the Proprietors did not sell his share of the land. In 1744 this share was laid off to him, and it fell in North Carolina [4]. The Proprietor was Lord Carteret, or Earl Granville as he had been created. He possessed his estates like any other private citizen. He continued to collect his fines, escheats, and forfeitures, as formerly, and to sell land for quit rents. When war broke out with Great Britain the State Government confiscated this property.

The Fundamental Constitutions and Land. We cannot pass to the more technical phase of our subject without speaking of the Fundamental Constitutions. As the Proprietors did not seriously attempt to put them into operation a few words will be sufficient here. In respect of personal freedom they were liberally conceived. In respect of landed property and the social organization depending on it, they were decidedly reactionary. They were ill-suited to the people for whom they were intended, and met with slight respect from those who originated them. While it is doubtless true that the Lords desired to put them into operation, it is also true that they never seriously attempted to do it. Along with the first copy that arrived in the colony came a set of rules which were to be followed until the more elaborate system could be made to work [5]. These rules constituted a temporary constitution, and under that the government was conducted. This is as near as the famous system ever came to a vital existence. The political development of the people was steadily away from it. Being intended for a full-grown cock it remained but an unhatched chick, with a few oscillations but never a sturdy stroke. It lingered in an uncertain state for about forty years, and then passed out of sight so quietly that the most painstaking research has not been able to determine when it ceased to breathe.

[1] Col. Recs. i. 706.
[2] Ibid. vii. 512, 543; also see Brickell, Nat. Hist. of N. C. p. 12.
[3] See Col. Recs. iv. 253, vi. 718, 773, vii. 453, viii. 52, 63, 254.
[4] Ibid. iv. 655. [5] Ibid. i. 181.

The Fundamental Constitutions[1] recognized six classes of landholders—Proprietors, Landgraves, Caciques, Lords of Manors, freemen, and leetmen. The first three classes constituted the hereditary nobility. The size of their estates was prescribed by law. Their lands were indivisible, inalienable, and descended according to the rules of primogeniture. These nobles could grant lands for not exceeding three lives or twenty-one years, provided they retained one-third of their property as demesne. Each of these three ranks were to constitute one of the four estates which made up the parliament. There were to be eight properties—one for each Proprietor—one Landgrave, and one Cacique in each County. The land of all these together was to be two-fifths of the County. Manors could be created within certain limits. They were alienable but not divisible. The Lord of the Manor could not grant a part of the manor for longer than three lives or twenty-one years. Each of these four classes had leetmen and could hold courts leet. The freemen held directly under the Proprietors as a body and were required—as well as all other landowners—to believe in a God, who was 'publicly and solemnly to be worshipped.' A leetman could not move off from his lord's estate without that lord's written permission. The rank was inherited or entered voluntarily. On the marriage of a leetman or a leetwoman the lord was to give the pair ten acres of land for their lives, and for this not more than one-eighth of the yearly produce could be taken as rent.

The Indians and Land. Sir Walter Raleigh's first expedition to Roanoke Island carried to England a young Indian chief called Manteo. Him the next expedition brought back so full of Christian ideas that he was forthwith baptized and made 'Lord of Roanoke.' This incident illustrates the attitude of the white man towards the red man's land. Everywhere the former claimed all the land and then assumed to allow the latter to hold a part of it as tenants. For a space the two parties lived side by side, usually as allies. Then there was war. The European won and was in a position to establish his claim.

This process is clearly seen in North Carolina. In 1691 the Proprietors declared that they had long since taken the Indians under their protection 'as subjects to the monarchy of England[2].' War came twenty years later, and immediately afterwards the Indians' lands were surveyed, that is to say, the savages were restricted to what we should now call 'reservations[3].' In order to

[1] They may be found in any collection of Locke's writings; also in Col. Recs. i. 187.

[2] Col. Recs. i. 378.

[3] Ibid. ii. 140, 316.

secure this land to the Indians a law was passed which forbade any white man without the consent of the Council to purchase any land that was claimed, or actually possessed, by an Indian [1].

The estate of the Red Men in their land was merely one of possession. An Act of 1729 (chap. 2) stipulated that the transaction under consideration should not be construed to 'invest the fee simple of the said lands in the Indians.' If, however, an Indian held land individually this Act was not to apply to him [2]. In 1748 (ch. 3, 2nd section) an Act was passed to ascertain the bounds of the Tuscarora lands. These lands had been confirmed by treaty in 1713. They were now confirmed anew to the Tuscaroras, their heirs, and successors for ever, or as long as they should live on them. The Indians were not to pay quit rents, and no person for any consideration was to purchase any of the land. Those whites then living on it were required to leave at once, but persons who had received grants for parts of it might enter and enjoy the same as soon as the savages had moved off [3]. When in 1766 (ch. 29) the Tuscaroras as a tribe sold these lands and left the province, the transfer was sanctioned by the Assembly. The mere consent of the Council does not seem to have been considered sufficient [4].

Alienation. The ordinary form of land transfer in North Carolina was the deed. Its popularity was perhaps as much due to the fact that it was employed by the Proprietors in granting land to settlers as to its superior convenience. It seems to have supplanted all other forms, except perhaps lease and release. Certain it is that fines and recoveries were not in use in North Carolina [5].

The absence of fines and recoveries caused inconvenience in reference to two kinds of transfers: (1) conveyances by femes coverts, and (2) the barring of entails. In regard to the former it was the early custom for the husband to convey with the wife's consent or for both to convey jointly, acknowledging the conveyance in Court after the wife was privately examined. By Act of 1715 (ch. 28) the latter was made the proper method, but the law was declared not to apply to entails. A difficulty arose from the inconvenience of getting the consent in Court of a feme who was either seriously sick or out of the province. In 1751 this was remedied by requiring in such cases, in addition to the husband's acknowledgment, a commission from the clerk to some third party who was to examine the wife as to her consent and report under oath to the Court [6].

[1] Revision of 1752, p. 39 (Laws of 1715, ch. 59).
[2] Ibid. p. 247.
[3] Revision of 1752, p. 9 Laws of 1715, ch. 28).
[4] Revision of 1773, p. 369.
[5] Ibid. p. 72.
[6] Ibid. p. 337.

In the early period entails were barred by private Acts of the Assembly. The expense of this prevented ordinarily the alienation of small estates tail. In 1749 (ch. 4, 2nd section) the Assembly enacted that entailed estates of less than fifty pounds value should thenceforth be alienated by a deed of bargain and sale for a valuable consideration actually delivered. Such a conveyance was to pass the fee and to bar the entail, remainder, and reversion. To determine the value of such an estate the Secretary of the province was to issue a writ *ad quod damnum* under which the Sheriff was to appoint a number of 'good and lawful men' to value the land in question and to report on the same. Such a deed of bargain and sale must be acknowledged in Court and duly registered[1]. The more valuable entailed estates continued to be barred, as formerly, by means of private bills.

Alienation by inheritance followed the general English practice, which was primogeniture. This view is supported by two facts. (1) There is not on the statute-book any law which interferes with primogeniture. We would therefore expect the English practice to prevail. (2) We find in various records several references to the 'heir-at-law' in a way which indicates that one of the heirs[2] of an intestate ancestor had landed rights superior to those of the other heirs[3]. The Act cited in note 3 indicates that primogeniture was stronger in the colony as a custom than as a right. Its importance was greatly lessened by the free alienation by wills and by the ready sale of land for debt. As for wills, they were made under the statutes 32 & 34 & 35 Henry VIII. Social and economic reasons made it difficult for an estate to pay off the debts of its owner, and consequently it was thought best to sell it. By an early law the lands of persons who had left the colony were held for debt[4]. This was repealed in 1746. An English statute (5 Geo. II), called 'An Act for the more Easy Recovery of Debts in His Majesty's Plantations,' replaced these laws. In 1764 North

[1] Revision of 1752, p. 291.

[2] It will be remembered that the American use of the word 'heir' is much wider than the English use of it.

[3] An Act in 1766 (ch. 5)—which is not the first time this Act appears in the Laws—directed the administrator of an estate to give the widow one-third and to distribute the remainder among the children. If any child 'not being the heir-at-law' had received property from the intestate by settlement or otherwise, it was to be counted in his share of the distributed property. 'But the heir-at-law, notwithstanding any land that he shall have by descent, or otherwise, from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate.' In this Act the term 'heir-at-law' is used three times: see Revision of 1773, p. 343; also Revision of 1765, p. 282. We also note that in 1729 Governor Burrington complained that certain executors in trust had detained 'the residuum from the heir-at-law,' after paying legacies. *Cf.* Col. Recs. iii. 28.

[4] Laws of 1715, ch. 18; also Col. Recs. iii. 182.

Carolina made a law supplementary to the British Act, but it was disallowed by the King [1].

Registration. From the beginning land deeds were required to be registered. In 1665, twelve years before the Statute of Frauds, the Proprietors established the office of Registrar. His duty was to record grants from the Lords as well as 'all conveyances of land howse or howses from man to man, as also leases for land howse or howses made or to be made by the landlord to any tenant for more than one year [2].' The first deed registered was the valid one. At first a deed must be proved by two witnesses before the Governor or 'some Chief Judge of a Court.' Gradually the function was taken away from the Governor, and by 1715 it was centered in the local, or Precinct, Courts, where it remained ever afterwards. This law of 1715 (ch. 38) provided that all land deeds, except mortgages, must be registered within twelve months or they would not convey a valid title. Deeds thus executed passed 'estates in land, or rights to other estates, without livery of seizin, attornment, or other ceremony in the Law whatsoever.' The first deed registered was the valid one, but if a first mortgage should be registered within fifty days a second one previously registered should not invalidate it. The giver of a second mortgage, the first remaining in force, was to lose his equity of redemption. Finally, a mortgage should not bar a widow of her right of dower [3].

This law did not entirely accomplish its object. In 1741 many persons through either ignorance or neglect had failed to register their deed within the proper time. These were relieved by having their time extended one year. In 1756 the same class of delinquents had the time extended two years, and this same law was after that re-enacted five times before 1773.

An interesting fact in this connexion is the attempt to introduce the custom of 'processioning lands.' In 1723 (ch. 4) an Act was passed providing that 'the lands of every person in this government shall be processioned and the marks renewed once in every three years.' Two freeholders appointed for the purpose, and such others as would go along, were to go over the bounds of the land, finding and renewing the marks. These two men made report of their action to the Precinct Court, where the report was preserved by the clerk. Persons whose lands were twice 'processioned' were to be considered sole owners and might plead this Act to that end; provided, however, that this law should not defeat the rights of reversion and remainder, or the titles of orphans, femes coverts, lunatics, &c. These persons were to have liberty to sue for their

[1] Revision of 1765, p. 358, and Revision of 1773, p. 328.
[2] Col. Recs. i. 79.
[3] Revision of 1752, p. 20.

rights within three years after the removal of disabilities [1]. The law for processioning remained on the statute-book in 1773, but it is likely that it was but poorly enforced.

Occupation. In the laws of 1715 (ch. 27) it was provided that all persons who held titles through sales made by creditors, by husbands and wives jointly, by husbands in right of their wives, or by endorsement of patents, and who without suit in law should continue in possession for seven years, these persons should have the legal title. Moreover, persons claiming lands, tenements, and hereditaments must present their claims within seven years after the rights descended or accrued, or be debarred from suing afterwards. Orphans, femes coverts, and infants were allowed three years in which to make claim after the disabilities were removed [2]. This law may possibly be very old law, for, as has been said, the laws of 1715 were mostly revisions. Perhaps it is not too much to connect it with a provision of the Proprietors in 1665 which declared that all who quietly enjoyed their land for seven years should not be required to resurvey them for any consideration whatsoever.

The above law deals with occupation where there is 'colour of title.' As to occupation 'without colour of title,' we find no mention of it in the early history of the colony. It is as late as 1755 (ch. 5) that we find a law allowing a good title to those who could prove undisturbed possession for twenty years. Here also infants and femes coverts could sue within three years after removal of disabilities [3]. This law was on the statute-book of 1765, but in that of 1773 it was indicated as 'repealed by proclamation.' It embodies the only legislation on the subject that is to be found in the colonial laws.

JOHN SPENCER BASSETT.

[1] Revision of 1752, p. 54. [2] Revision of 1773, p. 4. [3] Revision of 1765, p. 270.

FRENCH COURTS AND FOREIGN PARTIES.

IN the Law Journal for November 3, 1894, p. 628, in an article on 'British litigants in French Courts,' the following passage occurs:—

'It is not generally known in England that French Courts hold themselves entitled, as a matter of strict right, to refuse to adjudicate between foreigners in the absence of treaty stipulation conferring on foreigners rights of access to French Courts. But as other foreign nations, such as Portugal and Italy, have treaty rights of access, it is chiefly in regard to British litigants that the question is important.'

Further on, the article states that the French Courts declare themselves incompetent to decide disputes between foreigners, 'except where the defendant is domiciled in France, or the process relates to property in France, or to obligations contracted in France,' and that it is in commercial and maritime cases that the hardship is chiefly felt.

As this article was copied bodily in the Globe of November 5, where it was probably widely read, and as the subject is no doubt one of importance to Englishmen, it is perhaps worth while to notice some of the inaccuracies contained in the above exposition of the French law.

In the first place, it is quite true that many countries have treaty rights of access with France, notably Switzerland, but neither Italy nor Portugal is among the number. With regard to Italy, probably allusion is here made to art. 22, § 4, of the treaty of March 24, 1760, with Sardinia, when that kingdom became the kingdom of Italy, ratified on September 11, 1860, which provides that 'in order to be admitted to access before the tribunals, the subjects of both nations shall only be bound by the same formalities as those binding natives according to the practice of each tribunal;' but this clause has no effect with regard to the jurisdiction of the Courts. A decision of the Tribunal of the Seine reported in the Journal de droit international privé, 1879, p. 543, declared that 'Il n'existe aucun traité entre la France et l'Italie reconnaissant aux sujets italiens devant les tribunaux français la même situation qu'aux Français eux-mêmes en ce qui

concerne leurs réclamations contre les étrangers.' And this decision is quoted in Vincent and Pénaud's Dictionnaire de droit international privé, 1888, p. 280 [1], and is still good law.

As to Portugal, it is true that the Commercial Treaty between that country and France of December 19, 1881, confers upon the subjects of either nation equal rights in matters relating to commerce and industry. But here again this provision effects no change in the French law relating to jurisdiction in disputes between Portuguese subjects in France. (See 'Tribunal Seine,' May 10, 1883.)

To pass, however, to what is more important to English readers, viz. the real situation of foreigners, and more particularly of British subjects, with respect to the French Courts, the propositions laid down in the articles above referred to are incomplete and misleading.

To give jurisdiction to the French Courts in a dispute between foreigners, it is not sufficient that the defendant should be domiciled in France, that is, if the expression 'domiciled' be taken in the English sense of principally resident. He must also have received the authorization of the French Government to establish his residence in France, for only in this manner can a foreigner acquire a legal domicile in France in the eyes of the French law. If the plaintiff cannot show this, then he will be defeated, unless he can further prove that though the defendant has not been authorized to establish his domicile in France, yet he has acquired a *de facto* domicile, and has abandoned any previous home or establishment in his native country, to the Courts of which the plaintiff could apply for relief. If this be shown the French Courts will retain the cause, for otherwise there would be a denial of justice [2].

Nor is it enough, as stated in the Law Journal, that 'the process should relate to property in France, or to obligations contracted in France.' The property must be immoveables; a dispute as to personal property in France would be insufficient to give

[1] The Franco-Italian Commercial Treaty of 1881 deals solely with questions of tariff and similar matters, and has no relation to the jurisdiction of the Courts. Indeed, in a recent case before the Tribunal of Nice (June 21, 1892), where an Italian wife brought an action for a legal separation against her husband of the same nationality, domiciled in France, the husband set up the plea of want of jurisdiction, both parties being foreigners, and was only defeated by reason of the qualifying rule referred to below, that where a defendant is permanently resident in France he must show, in order to escape the jurisdiction, that he has a bona fide domicile abroad, and that relief can be sought there. The treaty with Sardinia relates to reciprocity in the execution of judgments.

[2] Aubry et Rau, i. p. 577, and viii. p. 146; Demangeat sur Foelix, i. p. 317; Paris, December 5, 1890, and May 18, 1892 (S. 1892, ii. 233); Paris, June 28, 1893; Seine, July 10, 1893 (La Loi of July 22, 1893). See also articles in the Journal de droit international privé, 1880, p. 475; 1886, p. 192, and p. 86 (notes).

jurisdiction to the French Courts, inasmuch as 'mobilia sequuntur personam,' and are not legally situate in France, when they belong to foreigners, except where moveables are treated *en masse*, as in cases of succession, when the testator was *de facto* domiciled in France. So with regard to 'obligations contracted in France.' This circumstance alone and *per se* is of no avail[1].

It is true that in commercial matters where the contract has been made in France *and* the goods delivered there, the French Courts have jurisdiction because an article of the Code of Procedure[2] expressly says so. The same article provides that there is jurisdiction if payment was intended to be made in France. But this article only applies in what are strictly commercial and maritime cases, so that so far from its being the case that the hardship of the French system is chiefly apparent in commercial and maritime cases, the fact is, on the contrary, that in this class of cases there is usually a loophole of escape, and it is in purely civil disputes, such as actions for recovery of debts, disputes between husband and wife, and matters relating to status that the rule presses with the greatest severity. But even with regard to these last matters, the stringency of the Courts of France has gradually very much relaxed. The French judges will always grant temporary relief in urgent cases, such as authorizing a wife to leave her home when it would be dangerous for her to remain there, taking measures for the protection of foreign infants abandoned or ill-treated by their parents, protecting the property of a foreign lunatic or absent person, &c.[3]

They will even entertain actions for divorce or legal separation between foreigners, where the party setting up the want of jurisdiction is unable to show to the satisfaction of the Court that he has a bona fide domicile abroad, and that the other party can apply for relief to the Courts of that domicile[4]. This of course was only an extension to questions of status of the ordinary rule before referred to, but nevertheless it was a distinct advance upon that doctrine, because for a long time all matters relating to the

[1] 'Le lieu où a pris naissance l'obligation qui sert de base à l'action pas plus que celui de l'exécution ne doit pas en principe influer sur la question de compétence.'—Rennes, April 23, 1855. 'La circonstance que le contrat a été passé en France ne saurait suffire par elle-même à entraîner la compétence du juge français.'—Cass. January 29, 1806.

[2] Art. 420, Code of Civil Procedure:—

'Le demandeur pourra assigner à son choix
Devant le tribunal du domicile du défendeur;
Devant celui dans l'arrondissement duquel la promesse a été faite et la marchandise livrée;
Devant celui dans l'arrondissement duquel le paiement devait être effectué.'

[3] Metz, July 26, 1863; Sir. 64. 2. 237; Trib. Seine, May 2, 1891.

[4] Nice, June 21, 1892; Paris, May 12, 1892.

status of foreigners were severely left alone by the French Courts, who themselves, as is well known, insist most emphatically upon the application of the French law of status to all Frenchmen wherever resident (art. 3 of the Civil Code).

Even in *ex parte* matters where there is no question of a dispute between persons actually resident in France, and where the injured party would be unable to obtain redress elsewhere, the French Courts have sometimes interfered. In a recent case they appointed a guardian to a foreign minor, a Greek, where the Greek consul had declined or neglected to take any steps in the matter [1].

Indeed, in a recent case they have so far departed from their usual rule not to interfere in such matters, as to appoint a 'conseil judiciaire'—that is, a person whose duty it is to control the finances of a spendthrift (prodigue), and without whose authority the spendthrift is unable to dispose of his property, borrow money, or give receipts for payments, &c. to a British subject, although the institution of such financial guardians is wholly unknown to the English law [2]. It is true that in that case the British subject was born in France, and had lived there all his life, having no home or relations in England, and that by English law, as pointed out in the judgment, such matters are governed by the law of the domicile.

Still the case goes rather further, in the application of the principal exception to the general rule, than any which had been previously decided, so far as the present writer is aware.

Finally, there are one or two other exceptions to the general rule, as in actions of a quasi-penal nature—as observed in the article which was the text of these remarks, where the cause of action arises from a delict or quasi-delict, and actions founded upon matters of public policy, or relating to acts of sovereignty.

However, in spite of the numerous exceptions and modifications gradually grafted by the decisions of the Courts upon the original rule, there can be little doubt that this rule is often productive of great inconvenience and injustice to foreigners. And considering the large number of nations having treaty rights of access to the French tribunals, including such countries as Guatemala, Honduras, Nicaragua, Paraguay, San Domingo, and the Sandwich Islands, it is somewhat remarkable that in these days of international conventions upon almost every conceivable subject it has not hitherto been thought worth while to secure a similar arrangement for the benefit of British subjects. Possibly, however, there are diplomatic difficulties in the way, which mere lawyers cannot be

[1] Seine, April 19, 1894. [2] Seine, April 6, 1894.

expected to understand. In any case, there can be little doubt that there are many international vexed questions still pending, where the need for reform is more urgently felt, and to which accordingly the efforts of diplomatists and governments have to be directed, to the exclusion of less pressing matters.

MALCOLM McILWRAITH.

MAINTENANCE AND EDUCATION.

A Note in Reply.

1. I HAVE read with interest the result of Mr. Bewes' investigation of the record in *Knapp* v. *Noyes*, an investigation which circumstances rendered it impossible for me to make. Incidentally, by reciting the 'maintenance and education' clause at length, he shows that I was right in my inference, drawn from the judgment, in spite of the head-note, as to the form of the clause, and the absence of any express reference to minority therein. With all deference to my critic, and with a sense of obligation to him for the light which he has brought to bear upon the case, I am still unable to see any indication that Lord Camden was adverting, in the last two paragraphs of his judgment, to anything but the text of the clause in question, and relying on anything but the force of the words 'maintenance and education' therein contained. That he might have arrived at the same result by another process seems to me not relevant, and I therefore abstain from offering any opinion as to the soundness of the arguments which Mr. Bewes thinks the L.C. might have used, but of the use of which the judgment, as reported, shows no sign. As to how far the reasoning of the judgment generally is to be relied on, and as to the merits of the report, I do not propose to add anything to what I said, but I cannot, without evidence, take it for granted that the judgment delivered was only partially reported, and that the part unreported would, if forthcoming, vary the meaning of the text as we have it. I observe that my critic concedes that 'the report in Ambler must be taken as accurate as far as it goes'; but his assumption of its incompleteness does not seem justified by internal evidence, which is apparently the only kind of evidence existing.

2. I have no quarrel with the saying that 'one man's nonsense should not be interpreted by another man's nonsense.' 'The House of Lords has laid down in *Jenkins* v. *Hughes* and other cases, that, on a question of construction, one Court is not bound by the construction put upon a similar instrument by another Court, unless some principle of construction is laid down, even though the words may be identically the same,' per Jessel M.R., in *Emmins* v. *Bradford*, 13 Ch. D. at p. 496. This rule has never, so far as I know,

prevented a judge from saying, when he finds in the document before him a word or phrase of common use and frequent appearance in documents of a like kind, that that word or phrase has naturally, or by force of previous decisions, or both, a prima facie meaning which it will retain unless modified by the context. This is all I conceive Lord Camden and Wood V.-C. to have done, and I ventured to hint that Lord Camden did not allow sufficient weight to the context in *Knapp* v. *Noyes*. As before, so now, I abstain from speaking of 'technical words' in the strict sense—for the rationale of interpreting them, *Roddy* v. *Fitzgerald*, 6 H. L. C. 823, is an authority.

3. Mr. Bewes' remarks on *Gardner* v. *Barber*, as well as on *Knapp* v. *Noyes*, seem to me, if I may say so, to exhibit a method of reading cases which is open to some objection. It does not seem to me legitimate to say that the grounds of principle and authority which a judge has adopted as the basis of his decision may be treated as *obiter dicta* because the particular result at which he arrived might have been reached by another method, or justified by different reasoning, or because the report of the judgment is conceivably incomplete. Of the 'special reasons' which Mr. Bewes gives, one, (*a*), is incidentally noticed by Wood V.-C. near the end of his judgment as confirming the view to which authority and his own view of the prima facie sense of words had led him—another, (*c*), is based on a circumstance which I pointed out (p. 335 n.), as having seemingly escaped attention—the third, (*b*), based on the words 'and so in proportion for any less term than a year,' seems also to have passed unnoticed. As a 'broken year' might as readily occur in the case of a life interest as in that of a minority allowance, the argument is of doubtful value.

4. Of the cases which Mr. Bewes mentions as omitted by me and as being 'important cases against my main contention,' *Alexander* v. *M'Cullock*, 1 Cox 391, did not escape my attention. I did not refer to it because I was of opinion that in a discussion of the extent of allowances for 'maintenance and education' it was not necessary to cite the case of a will in which neither of those words occurred. With all deference to my critic, my opinion on this point remains as before. *Kilvington* v. *Gray*, 10 Sim. 29, which I incidentally referred to (p. 335 n.), did not strike me as important, because the context of the word 'maintenance' (not 'maintenance and education') seemed to point clearly to something more than a mere minority provision being intended. It is to be observed that the argument does not seem to have turned on the question 'minority or life,' but on the question 'jurisdiction of Court or discretion of trustees.'

5. I do not dispute that the word 'annuity' has acquired a prima facie sense of 'yearly allowance for life.' It is conceivable that a judge who agreed with Lord Camden and Wood V.-C., and deemed himself bound by their authority, as to the prima facie meaning of a provision expressed to be made for maintenance and education, might, if he had to construe words like 'an annuity of £ to *A* for his maintenance and education,' feel called upon to decide that the prima facie meaning of 'annuity' was to prevail. I have not suggested that words of purpose are to be looked at to supply a time-limit of enjoyment, save in the absence of other words from which a time-limit may fairly be extracted. In such a case, I do not think that the circumstance of the beneficiary not being in need of the provision is relevant. The important matter is the intention of the settlor or testator, who has, *ex hypothesi*, omitted to indicate a time-limit, except so far as one may be gathered from his words of purpose.

6. I should like to make a slight alteration in one paragraph of my article, and to add a foot-note, which, by an oversight, I failed to send up in time. The last sentence of my sketch of the judgment in *Wilkins* v. *Jodrell* (p. 338), should run: 'He also referred to a class of authorities not really, it is submitted, relevant, as in them the association of an adult with infants in the enjoyment of a provision expressed to be for maintenance, or the engrafting upon a life interest, by words expressive of the testator's purpose in giving the life interest, and strong and precise enough to found a trust, of provisions for the maintenance or maintenance and education of the life-tenant's children [1], would seem to rebut any presumption which might be drawn prima facie from the words, that the infants' interest was to cease at majority.'

T. K. NUTTALL.

[1] For the last case of this class, see *Re Booth*, '94, 2 Ch. 282 (North J.). It seems that in cases of this class a considerable discretion is left to the life-tenant. A child may lose its right by marriage (*Bowden* v. *Laing*), but not necessarily (*Re Booth*), and the right may revive, e. g. on widowhood in the case of a daughter (*Scott* v. *Key*, 35 Beav. 291)—it may be affected by the fact of advancement out of the *corpus*, or by the general circumstances of the child (*Re Booth*). For a caustic comment on the 'cruel kindness' of the Court in erecting trusts upon such expressions of purpose in cases of this kind, see the judgment of James L.J. in *Lambe* v. *Eames*, L. R. 6 Ch. 599.

A SPANISH APOSTLE OF BENTHAMISM.

WHEN, in 1811, the Liberals of Spain, by drafting the famous Constitution of Cadiz, laid the foundation of all the modern political life of their country, forty years had elapsed since Jeremy Bentham published his first book. Those forty years had now given him celebrity; and his celebrity was still greater on the Continent than in his own island. For in England, during his own lifetime, Bentham's reputation and his practical influence upon legislation were due mainly to his writings upon topics of mere current interest. But there were greater works, whose publication gave him immediately a fame on the Continent, and laid the permanent basis of that which he now enjoys at home. The 'Theory of Legislation,' the 'Theory of Punishments and Rewards,' the 'Political Tactics,' and 'Judicial Evidence,' have been translated into almost every language, even into that of Bentham's own countrymen; and have done more than the works of any other single writer to ameliorate the legislation of the civilized world.

But in these and similar permanent treatises, though the thought and materials were Bentham's, the style and shape were usually due to the pen of some subordinate expositor. Bentham happily had in Dumont, Stuart Mill, and Bowring, not only enthusiastic disciples, but also painstaking editors possessed of a popular style. The only book of fundamental scope due to Bentham's own hand was the 'Introduction to the Principles and Morals of Legislation'; and this, after its first publication in 1789, was not reprinted till thirty-four years later, and has never been translated into any foreign language. The expositions of the disciples were more attractive than those of the master himself. Bentham loved the difficult task of original discovery, the patient analysis of ideas, the laborious deduction of consequences; but from the elaboration of literary form, and the technical craft of arresting popular attention, he turned impatiently away. Even when a treatise had already been carried very far, if some novel and perhaps dissonant idea occurred to him, he would put down the pen and undertake a minute study of the newcomer; so that his pigeon-holes came at last to be stuffed with a multiplicity of unfinished manuscripts, kindred in their subjects, yet differing in their titles and in their points of view. During most of his life he spent his time in

assiduous study, often carrying on several works simultaneously. Hence at his death many of his intended books still remained utterly inchoate; and his long-planned comprehensive view of his system had not yet been seriously commenced. If a manuscript of Bentham's had to go straight to the press, he could write with a vigour and directness that bordered upon gaiety. But when, as usually happened, he had indefinite time for labouring on his work, he elaborated it with such masses of detail and digression as, if printed, would dishearten any ordinary reader. The logical rigour on which he prided himself made his labours so vast that when death surprised him in the midst of his unremitted toil, at the age of eighty-four, after sixty-two years of unceasing labour, he had not finished the business of preparation, and had scarcely commenced that of exposition. Little of general range was finished; there was simply an immense mass of incomplete attempts and of mere monographs, which now fill eighty wooden boxes and various portfolios in the library of University College, London—not, as Señor Silvela by an almost pathetic error supposes, in the University College of Bentham's own Alma Mater on the Isis. Hence arose the importance of the services of disciples who could retrench, supplement, and popularize; so as to give to the world a book which embodied Bentham's ideas, and which nevertheless was readable. How much Dumont, Stuart Mill, Grote, Bowring, and Francis Place did in this direction everybody knows. But Señor Silvela presents us with an interesting sketch of another such disciple and apostle, a Spanish Utilitarian, whose attempts to give a popular exposition of Benthamism are scarcely known even by name to Englishmen, though they appear to have been regarded with exceptional favour by the master himself. Bentham seems readily to have supplied all his expositors with manuscript material; but, perhaps from the expectation of ultimately superseding all their efforts by some comprehensive treatise of his own, he appears never to have been willing to share the labours, the responsibility, or the honour, of their task of exposition. Though he owed to Dumont the whole of his Continental and much of his English reputation, he never gave his formal approval to Dumont's books. Even so late as 1811, when issuing the 'Theory of Punishments and Rewards,' Dumont still had to say that Bentham, though continuing to trust him with his manuscripts, 'wishes to be in no way responsible for the books'; and in 1827 Bentham went so far as to growl out in conversation that 'Dumont does not understand a word of my meaning.' Yet the recognition denied to Dumont and Mill seems to have been conceded to this Spanish exponent, Toribio Nuñez.

This writer, according to Señor Silvela's account, 'realized in great measure the aim to which Bentham had in vain directed his own life—the final achievement of expounding the fundamental principles of all branches of legislation. And he did this in a volume which Bentham himself sanctioned with the exceptional honour of his own express approval; and which is consequently, however it may have fallen into undeserved oblivion, the most authoritative of all the manuals of Benthamic jurisprudence.' Other Spaniards had already undertaken translations from Bentham's writings. 'Of all English writers,' says Blaquiere in 1822, 'Bentham ought to be the most satisfied with his reputation in Spain.' For, between 1820 and 1845, 'no other foreign author,' says Señor Silvela, 'exercised in Spain so great an authority as Bentham.' His book on Prisons was translated as early as 1819; and translations of other works of his continued to appear in long series, including a translation of his collected writings in fourteen volumes. But the writings of Nuñez stand above all these; for they were far more than mere translations.

Señor Silvela, in his patriotic anxiety to revive the memory of the Spanish disciple who was thus highly favoured by the great English jurist, has searched the archives of the University of Salamanca and has sought out the surviving members of the Nuñez family. A granddaughter, Doña Javiera Nuñez, entrusted him with two autograph letters from Bentham to Nuñez; and also with one of Nuñez' replies, which had been thought so important by Bentham's literary executor that extracts from it may be found printed in his collected edition of Bentham's works.

Nuñez himself was born in 1776; and entered the University of Salamanca in 1790. Here a Spanish translation of 'Télémaque' fell into his hands, and inspired him with a wish to learn French. This tale, by a curious coincidence, was the very book that had kindled the enthusiasm of Bentham himself, at the mature age of seven, and became 'the foundation stone of my whole character, the starting-point of my career in life; to it the first dawning in my mind of the principle of Utility may be traced' (Works, x. 10). It may perhaps have similarly turned Nuñez' mind towards sociological problems, or even have suggested to him the Utilitarian clue to their solution; if not, it at least led him to learn the language in which he found books that did all this. Having devoted himself to the study of Canon Law and Jurisprudence, Nuñez obtained his doctorate in 1792; and subsequently undertook various academical offices. But, failing in his candidature for a Professorship, he quitted the University and devoted himself to business pursuits; still prosecuting his studies until he had amassed the means of retiring

into learned leisure. In 1807, the march of the French army through Spain on its way to Portugal accidentally gave him an opportunity of purchasing from one of its hucksters a copy of Dumont's 'Theory of Legislation.' A perusal of this book produced an indelible impression on his mind. Thenceforward he was a devoted disciple of Bentham.

In 1812 he was recalled to Salamanca as University Librarian; and in the following year he gave full proof of his familiarity with Bentham's works in his 'Account of the University of Salamanca, its plan of studies, its foundation and history, and the reforms of which it is susceptible; with a proposal for a law on public education.' This was drafted as a preface for a Report that the University had to make in answer to a general summons issued by the Cortes, which thus early in the first epoch of Spanish Constitutionalism had begun to show an active interest in national education. The University Council long debated whether or not Nuñez' dissertation should be allowed to get into print for general circulation, fearing that the public would take alarm at its excessive Liberalism. It was urged, for instance, that the portion bearing on moral training could not safely be issued to the world at large without the addition of a sprinkling of Biblical texts that would reiterate its ethical rules, 'and so make them more religious.' As a matter of fact, the dissertation did not get into the press until seven years later, and the University did not then find it necessary to add the Scriptural seasoning; times had changed between the first Constitutional period and the second, and it was no longer indispensable to make morality more religious.

This dissertation begins with phrases which are obviously borrowed from Bentham's own 'Principles of Morals and Legislation.' Utility as the basis of social science, public happiness as the great object of legislation, and the physical, moral, religious, and political sanctions as the determinants of human action, are the keynotes of Nuñez' philosophy. And his remark that they all are so obvious that any attempt to prove them would be an insult to the Cortes and the Spanish nation is a characteristic saying that bears the very hall-mark of genuine Benthamite enthusiasm. None the less, Nuñez' plan for national education hyper-Liberal as it seemed, was far from recognizing our modern freedom of teaching, a right of which no one then dreamed. He proposed that every branch of instruction throughout Spain should be rigidly controlled by the State; the first duty of Government being to establish a body of political, moral and religious doctrine which should secure respect for the King, the Constitution and the Church, and should be embodied in an entire series of educational literature, beginning

with the primer and working up to the University text-book. That any one who had not obtained official recognition should take upon himself to give instruction, would be an offence so opposed to the greatest happiness of the greatest number that it was to be rendered penal. Finally, by a provision so quaintly at variance with the realities of life that nothing but the engaging enthusiasm of dawning Liberalism can account for it, all the parochial clergy were to be charged with the duty of defending and propagating this official body of social doctrine which set the seal of State and Church upon the current theories of Spanish Liberalism, and especially upon the new-born but sacred Constitution of 1812. The scheme, of course, never became law; for the counter-revolution in the spring of 1814 placed Ferdinand again upon an absolute throne, and its approach must already have been terribly obvious to the Doctors of Salamanca when drafting their Report. Six years later, however, when in March, 1820, the insurrection at Cadiz ushered in a second period of Constitutionalism, this Report was revived and published by the University.

But the intervening years of absolutism, from 1814 to 1820, had been a time of suffering for Toribio Nuñez. In 1816 the University of Salamanca had been purged by a Royal Commission, which dismissed Nuñez from his librarianship without even a pension. He retired to Piedrahita; the town where the granddaughter who possesses his papers still resides. But in 1820 he was recalled to his librarianship. He immediately availed himself of the freer times by publishing a book. It was entitled 'The Spirit of Bentham: a system of Social Science on the plan of the English jurist, Jeremy Bentham, carried out according to his principles by Dr. Toribio Nuñez, a Spanish jurist.' This little volume of one hundred and forty pages is, as Bentham himself described it, 'a sort of analytical view' of Utilitarian principles. Señor Silvela says truly that it is 'written with admirable clearness of diction and arrangement, and with an enthusiasm of conviction which fascinates the reader'; and he adds, 'I can say without fear of contradiction that it is the best existing exposition of Benthamism.'

It was only intended as preliminary to a Spanish translation, or rather codification, of Bentham's entire works, which Nuñez was contemplating; and for which he invited subscriptions. He assures his subscribers that Bentham must be still alive, 'for his French editor says so,' and a Spanish correspondent of his, Señor de Mora, 'has given me authentic proofs of it.' Accordingly he urges all lovers of knowledge 'to implore Bentham to confer upon mankind the greatest favour that he can, by either correcting the rough sketch which I have given of his system, or else by arranging for

the literal publication of his own original manuscripts.' For Nuñez very frankly declares that though Dumont deserved the credit of having made Benthamism known, he could not be complimented upon being either profound or precise. Nuñez proposed to organize from Bentham's materials 'a complete system of social science' in three volumes, treating respectively of the 'Principles,' the 'Theories,' and the 'Arts' of that science. The first was to be an expanded version of this Preliminary Discourse, and to embody 'the arithmetic, logic, anatomy, physiology, pathology, and nosology' of the subject; the second, its 'pharmacology and clinical pharmacopoeia'; and the third, its 'hygiene and dynamics.'

A copy of the Preliminary Discourse was naturally sent to Bentham. His letter of acknowledgment, which has been preserved by Nuñez' granddaughter, is of the most cordial character. 'Worthy and eminently well-beloved disciple,' writes the master, 'thy mind is the very child of mine, thy talent of my talent, thy enthusiasm of that enthusiasm which, kindled four and sixty years ago, is not altogether quenched by age.' How little, indeed, age had withered him he proceeds vividly to portray. 'It is, I see, a matter of uncertainty to thee whether I am alive. Yes, I not only am still living, but, though seventy-three years of age and as fully prepared for dying at any time as it is possible for man to be, I feel so little defalcation from the small allotment of bodily force my parents gave me that I see nothing as yet to prevent my living some years longer. And as to gaiety, I possess more than I ever did at any former period: not less than the boys who write for me and laugh with me and at me; and full as much as any of the few adult friends whom I can afford time to see—a state of mind for which I am indebted to the occupation given to the greater part of my time, and to observation of the fruits which by degrees are flowing from it.' Noticing Nuñez' desire of becoming acquainted with his original manuscripts, unpolished by Dumont, he goes on to say that, 'in knowing only such works of mine as have found a French elaborator and editor in Dumont, scarcely dost thou know half of me. Of all my works, published and unpublished, I am getting together a collection and shall employ my endeavours in getting it forwarded to thee.' In a postscript, Bentham gives a bitter picture of the English Universities. 'From Salamanca such a book as thine! From Coimbra marks of Liberalism altogether correspondent! In the University of Coimbra was Dumont's edition of my works, almost as soon as edited, an object of attention. What Salamanca and Coimbra were before that time, Oxford and Cambridge are still. Oxford, in which the whole force of that wretched substitute for a mind which has been in possession of the rulers has

been engrossed—what I say is the result of a course of observation that commenced full sixty years ago—has been engrossed in keeping the minds of the rising generation excluded from the whole field of politics and morals. Poetry and the empty or delusive sort of literature styled classical, being the pursuits to which the universal attention has all along been directed by whatsoever of the nature of reward has ever been applied to so much as the show of merit. Idleness, dissipation, and drunkenness have been regarded as virtues, and as such secretly cherished, rather than that the minds of the ruling few in their growing state should be turned towards the science so aptly styled by you the Social Science—that science, in the progress of which the allied powers of tyranny corruption and delusion have so long and so clearly beheld their final downfall! Oxford, in which, without instruction of any shape, except the little that could originate in my own unfurnished uncultivated and unassisted mind, I consumed in vapid idleness five or six of the most precious years of my life, after five spent in learning Latin and Greek at the great public school of Westminster, another poison-instituting seminary.'

Nuñez' political engagements, and his share in composing the University of Salamanca's comments on the Draft Penal Code, prevented him from answering this letter until December 1821. But, within a fortnight of receiving that answer, Bentham sent a rejoinder, accompanied by a manuscript summary of some books that were still uncompleted. This rejoinder has also been preserved by Doña Javiera Nuñez, and is dated February 12, 1822. It expresses Bentham's fears of the 'mass of misery impending over Spain, in consequence of the concentration of executive power in the hands of the king—a man placed in a situation which renders him completely necessarily and incurably hostile to everything that is contributory to the greatest happiness of the greatest number.' And Bentham adds, 'for averting this mass of misery from your country my main trust is in *you*.'

Señor Silvela assumes that Nuñez 'did not proceed with the publications promised in his prospectus of 1820, for no volume of them is known to exist.' But in this respect London seems to be richer than Madrid; for the British Museum does possess the opening volume of the proposed recasting of Benthamism. It is entitled 'Principles of Social Science, or of the Moral and Political Sciences, by the English jurist, Jeremy Bentham; arranged in accordance with the original author's system, and applied to the Spanish Constitution, by Don Toribio Nuñez.' Its contents occupy about 560 pages; and are concerned with the moral 'arithmetic, logic, anatomy, physiology, pathology, and nosology,' which, as we

have seen, were to form the first volume of the promised triad. The preface, addressed to the young men of Spain, declares the author's aim to be 'to link Socrates' philosophy to Bentham's, by the help of Kant's'; or, in other words, to use the German's account of man's moral judgments as a logical foundation for that Utilitarian ideal which the Greek had suggested, and which the English philosopher had supplied the means of pursuing with precision. It was issued by the same press at Salamanca which had issued the preliminary 'Spirit of Bentham'; and it bears the date of 1821. But Nuñez' entire silence about it, when writing to Bentham so late as December 20 of that year, suggests the inference that it cannot really have appeared until 1822.

Nuñez, by that time, had been elected by the province of Salamanca as one of its deputies to the Cortes: and he took an active part in the debates upon the Code of Procedure and upon the measures to be taken for punishing the insurgent royalists who were already threatening the overthrow of the parliamentary constitution. It was almost inevitable that this volume of abstract jurisprudential 'Principles,' issued in those anxious days, should fall stillborn into oblivion. The Cortes managed to survive till 1823; retreating from Madrid to Seville, and finally from Seville to Cadiz, to die in the city which gave it birth. Nuñez, staunch in his Liberalism, took an active part in its labours and its dangers, until the moment when French bayonets re-established absolute monarchy. He then sank into poverty; and the man, who in 1821 had described himself to Bentham as having amassed fortune sufficient to maintain himself and his family comfortably, had at last to rely for support upon his son's labour. After living for eleven years at Seville in these straitened circumstances, he fell a victim to cholera in 1834. The admirers of his works defrayed the expenses of his funeral; and placed over him an epitaph commemorating his high character, but 'leaving the eulogy of his virtues to the posterity which his immortal writings will render happy.'

During those final melancholy years Nuñez continued to prosecute his studies of Utilitarianism; and Señor Silvela feels assured that Bentham, who survived till within two years before Nuñez' death, must have continued to assist him with letters and manuscripts. But no direct evidence of all this seems to be forthcoming at the present day. We know, however, that Nuñez at his decease left behind him a manuscript treatise; which his sister-in-law and legatee, Doña Ignacia Osorio, presented to the Spanish government. The government submitted the book for an opinion upon its merits to a Commission which was then sitting to draw up a Civil Code

(and of which Pacheco, a still famous Spanish writer on Criminal Jurisprudence, was a member). On their recommendation, it was sent to the press by royal order. It appeared in 1835, in the form of an octavo volume of 564 pages; under the title of 'Social Science, according to the principles of Bentham.' To it was prefixed a preface, written by the Commissioners, which, after giving an account of the literary labours of Bentham and of Dumont, proceeds to state that 'Nuñez, being more deeply penetrated than Dumont with the actual spirit of Bentham, succeeded, by help of assiduous study, in realizing Bentham's great design, by entirely recasting the works put out by Dumont and consolidating them into a coherent body of doctrine. When this task had been accomplished, he submitted the result to Bentham himself; who, in autograph letters written in English, which have been laid before the Commission, assured Nuñez that he had caught his true spirit (que había adivinado su verdadero espíritu).' As we have already seen, even Dumont's great expositions had not received such an endorsement from the Master. But one cannot help feeling that these words of eulogium are so akin to the 'Thy mind is the very child of mine' (with which the Master had greeted the preliminary discourse on the Spirit of Bentham) as to justify a doubt whether the letters perused by the Commissioners had really any connexion at all with the posthumously published manuscript composed in Nuñez' declining days, and were not simply the two (still extant) epistles, of an earlier period, in which we have seen that phrase. And when Nuñez himself, in this posthumous work (p. xxxi), speaks of having received approbation from Bentham, it is in terms that seem to refer only to his early pamphlet, the 'Spirit of Bentham.'

However great may have been Nuñez' qualifications for the task of outrivalling Dumont, the absence of Dumont's familiar name, and of the still more familiar titles of his works, impaired the book's prospects of attracting attention; and perhaps amongst Spanish men of letters its circulation was not likely to be promoted, in that period of hated Absolutism, by its having had the honour of issuing from the royal press. The fact at any rate remains that, according to Señor Silvela's testimony, this posthumous fruit of the honourable and pathetic life of Nuñez soon sank into obscurity even in its own country. No copy of it is to be found in the libraries of the British Museum or the Inns of Court; but, with some trouble, I recently obtained one in Madrid.

The object of this volume was, as the preface suggests, to consolidate Dumont's chief writings — correcting at the same time various errors into which the facile pen of the Genevese had carried him—into a compact body of doctrines, all deducible from the

simple basis of general utility. It is in some sort a fulfilment of the promise, made in the 'Preliminary Discourse,' to codify Benthamism. As we have seen, a first volume of that codification had already been published, a dozen years before its author's death. But this posthumous book is a separate work, though occupied partly with the same ground which that volume had traversed.

Cambacères, sixty years previously, had made famous the phrase 'Social Science' in the discourse which he delivered at Paris before the Académie des Sciences morales et politiques upon 'l'art de faire jouir du bonheur la société.' Nuñez' posthumous volume is a systematic exposition of what he describes as the 'theoretical' portion of this science. Its first and second books cover the so-called Moral Arithmetic, Moral Logic, Moral Anatomy, Moral Physiology, Moral Pathology, and Moral Nosology, which had already been written upon in the volume dated 1821. Its third book is occupied, to continue his medical terminology, with Moral Therapeutics, the various direct remedies—preventive, suppressive, satisfacient, and penal—for breaches of law. The fourth book, on Political Dynamics, deals with those remedies which are indirect. The fifth and final book, on Social Hygiene, purports to give an account of the jural constituents of a state of true public happiness. The theoretical portion of Social Science having thus been completed, Nuñez admits that it ought to have been supplemented by a book on the practical or 'Clinical' portion, which would include the topics discussed in Bentham's works on Judicial Evidence, Judicial Organization, and Political Tactics. But, in part excuse for its omission, he pleads that Dumont had understood this part of the science better than the earlier and theoretical parts—parts on which, unhappily (p. xxi), 'Sir[1] Bentham handed to Mr.[1] Dumont original MSS. of his theories from which the latter composed those undigested French treatises that till now have kept under eclipse that light of Bentham's which glimmered through them, but which in the present volume shines out in clearness and brilliancy.'

COURTNEY KENNY.

[1] *Sic* in Nuñez's text.

ONE MAN COMPANIES.

'I SEE no reason,' said Sir George Jessel, 'why three persons as well as seven might not contract to carry on business wholly free from liability beyond what sums they subscribed if it were duly notified to their creditors, or why one person might not do it—why he might not advertise, for instance, that he has put £10,000 into a concern and will not be liable for a shilling beyond it. If John Brown started a company, John Brown, Limited, and deposited a notice with the Joint Stock Co.'s Registrar that John Brown, Limited, was a company consisting of John Brown, and that he had put £10,000 into it and was not to be liable for anything beyond that, I see no objection to that being allowed. Anybody dealing with John Brown would know that.' 'I think,' he added, 'there should be the means of allowing people to go into partnership with limited liability.' The commercial world thinks so too, and the multiplication of private companies is striking evidence of the fact. Whether the Legislature contemplated the use of the machinery of the Companies Act, 1862, for this purpose may be doubted. Vaughan Williams J. thinks it did not. But such companies are clearly within the letter of the Act, and a good deal may be said for their being within the policy of the Act too. The advantages they offer have been perseveringly preached by Mr. Palmer. Incorporation secures first of all the benefit of limited liability. It further preserves the continuity of the partnership unaffected by the death, lunacy, or bankruptcy of the members or by other contingencies. It minimizes the dangers of a dishonest partner by restricting the agency of the directors in articles of which all persons dealing with the company have constructive notice. It facilitates dealing with the shares of the partners by sale, mortgage, or settlement. It affords greater facilities for borrowing, more particularly for raising money on debentures. A shareholder who lends money to the company is not at the disadvantage of being postponed to other creditors as an ordinary partner is who lends to the firm (Partnership Act, 1890, s. 44). If a syndicate is to be formed a private company is the most convenient shape it can take. These advantages are real advantages—practical and substantial advantages to the trader—and, what is more, they are all legitimate advantages. Thousands of honest private trading companies have

been formed on these lines and are growing and flourishing concerns. But tares grow with the wheat in this world, and there are certain phases of private company promotion, pointed out by the latest Companies' Winding-up Report and by recent cases in the Courts, which cannot be commended in the interests of fair trading. Take Sir George Jessel's instance, the proprietor of a chandler's shop. He buys Mr. Palmer's little book, let us say, or he gets a circular from an agency pointing out the advantages of incorporation and undertaking to obtain it for him with limited liability for a fee of five guineas, and he is minded to turn his business into a company. It may be he wishes to make it a family business; it may be he hopes to give it a factitious importance, which the addition of the magic 'Co.' is well known to do; it may be he wants to raise money by the issue of debentures. There are a dozen legitimate motives for desiring incorporation, and it is really difficult to discover what illegitimate object he can serve by doing it. If he wants to palm off a declining business at a large profit he offers it by prospectus and asks a confiding public to subscribe: he does not form a private company; if he did, he would only be defrauding himself or his partners or his family. If he wishes to get rid of his indebtedness, he does not form a private company—it is no use. A transfer of a business by an insolvent to himself under a corporate name would be void under the statute of Elizabeth as defeating and delaying creditors; *Broderip* v. *Salomon* (W. N. 1895, 38). Suppose him then incorporated as a so-called one man company with six dummy signatories, clerks, employés, or members of his family. The Companies Report in horrified italics points out that this 'virtually amounts to one man trading with the full protection of limited liability.' It is quite true—it does. But is there any harm in that? Every company is in a sense a one man company, that is to say is controlled by a ruling spirit. Directors are mostly dummies, and shareholders mere dividend drawers. Unity of management and control is from a commercial point of view a most desirable thing. As to the persons who deal with the incorporated trader—the one man company—they all know he is limited and know what his capital is. What, unfortunately, they do not know is how that capital is charged, and here it is that the real mischief comes in. The vendor, the private company promoter, cannot of course get his price paid in cash, so he takes it in first mortgage debentures charged by way of floating security on the whole property of the company, including its uncalled capital. These debentures he may hold himself, as he did in *Broderip* v. *Salomon* (supra), or transfer to a creditor of his own, as he did in *Davies* v. *Bolton & Co.* ('94,

3 Ch. 678), or he may sell them, as he easily can, in the market. Whichever he does the result is the same. The company commences trading and incurs debts to unsecured creditors. If it succeeds, no difficulty of course occurs; if it fails, down sweep the harpy debenture holders and lay hands on everything, leaving nothing for the unsecured creditors. This is of course a genuine grievance, and Vaughan Williams J., as the experienced critic and censor of company operations, has just given checkmate to the vendor debenture holder in such a transaction, by holding that where a private company is to all intents and purposes the promoter's corporate self—himself and six dummies—the company is the mere agent of the promoter-vendor, and as such entitled to be indemnified by the promoter-vendor as principal against debts incurred in carrying on the business. This is a novel view, and whether it will be affirmed by the Court of Appeal remains to be seen. Control of the company the most complete may exist and yet may not constitute agency. It seems to be in every case a question of fact; but what we are concerned to point out is that the real mischief comes not of one man turning himself into a company and trading with limited liability, but of the unlimited borrowing powers allowed to limited companies. When the privilege of limited liability was conceded, it was conceded on the terms that the subscribed capital should be inviolable. It was to be paid up in cash. It was to be irreducible. That was the price of the privilege—the creditors' security. No doubt the Companies' Act 1862 contemplated a limited company borrowing. The Register of Mortgages shows that it did. But there is not a word in the Act to indicate that it contemplated a company mortgaging or charging its uncalled capital, and in the earlier cases the Courts, with a true instinct, though for a wrong reason, held that it could not be done (*Stanley's case*, 4 D. J. & S. 407). Now it is universal.

Floating debentures that sweep away the company's whole assets have this further vice. The liquidation of the company becomes a debenture holders' administration, not a winding up by the Court. The Court will not as a rule make a winding-up order where the charges exhaust the assets and leave nothing for the unsecured creditors, and if the Court, feeling the importance of an investigation, does make a compulsory order in such a case, as it did in *In re Krasnapolsky Restaurant Co.* ('92, 3 Ch. 174), the Official Receiver cannot by the winding-up rules, if the assets are nil, take any proceedings without the sanction of the Board of Trade—a sanction, of course, which can only be expected to be given in very clear cases. Thus the salutary provisions for investigation and punishment of fraud are defeated. What then is the remedy?

Plainly, first, to restrict the borrowing powers of limited trading companies, whether they are public or private companies, limiting it to one-half or at most two-thirds of the company's property in the same way that companies formed under Royal Charter or by Special Acts are limited; and, secondly, by securing that all persons dealing with the company shall have the means of knowing the extent to which the property of the company is mortgaged or charged. The Court of Appeal has in *Standard Manufacturing Co.* ('91, 1 Ch. 627) dispensed with registration of debentures or trust-deeds, charging chattels, under the Bills of Sale Acts, on the ground—and a very reasonable one—that double registration is not wanted; but this presupposes that the company's register under s. 43 is sufficient notice to persons dealing with the company, and it is well known that it is not. The suggested amendments are simple and practicable, and can do no possible harm to legitimate trading. Drastic reforms are to be deprecated.

The giant growth of joint stock enterprise is one of the marvels of our day. Whatever hard things may be said of it, it has conferred very great benefits on the community. It has given an enormous impulse to trade; it has unlocked by the magic key of limited liability vast sums for useful industrial undertakings; it has made the poor man, by co-operation, a capitalist. Let us beware lest in gathering the tares we root up the wheat also.

EDWARD MANSON.

REVIEWS AND NOTICES.

[**Short notices do not necessarily exclude fuller review hereafter.**]

L'Intervento della Difesa nell' Istruttoria. Per UGO CONTI. Estratto dalla Rivista Penale. Vol. XLI, fasc. I. Torino. 1895. 8vo. 43 pp.

As the author of this pamphlet justly observes, the whole system of Italian Criminal Procedure calls, not for partial modification, but for thoroughgoing reform.

Signor Conti deals with only one point, the extent to which an accused person should be allowed to have legal assistance during the *istruttoria*. The proceedings to which this term applies correspond with the examination before a magistrate in this country, but differ from such examination in many essential respects. The *istruttoria* is admittedly inquisitorial, and its prototype may be recognized in the Roman criminal procedure as developed under the Empire. From her Germanic invaders Italy borrowed, during the feudal period, the accusatorial system with its well-known incidents of publicity and of judicial impartiality (at least in theory) between the aggrieved prosecutor and the defendant. The accusatorial system declined throughout Italy, and in a great measure throughout Europe, with the growth of monarchical principles, and (as M. Tanon has lately shown) with the extension of the Inquisition, eminently so called, which applied the inquisitorial system to every stage of the trial.

The French Code of Criminal Procedure of 1808, on which the one now in force in Italy is modelled (superseding a decree of 1789 which gave much greater privileges to the accused), adopted the so-called *mixed* system, according to which the preliminary investigation is conducted on inquisitorial, the final trial on accusatorial, principles.

Signor Conti passes in review the laws which regulate this department of criminal procedure in foreign countries. He admires the English system, but appears to consider it unsuited to the national character and political institutions of the Italians.

Among the reforms he advocates, the principal one is that the accused should have legal assistance—gratuitously, if he cannot afford to pay—from the time he is formally charged; and Signor Conti takes occasion to animadvert (as the Count de Franqueville has done) on the practical inequality in the administration of justice, as between rich and poor, that the absence of a similar provision in this country gives rise to. On the other hand, the functions of the *difensore*, i. e. solicitor or counsel for the defence, would under the author's proposed system be somewhat circumscribed. His proposals, though liberal as compared with the existing practice, only go the length of allowing the *difensore* to see his client after the latter has undergone his first interrogatory; i. e. after a possibly innocent defendant has been entrapped by an artful examiner into admissions or contradictions

to be used against him. In other respects too the defence would have much less freedom, even with Signor Conti's reforms, than we are accustomed to here. The learned author does not seem to think it as important as English publicists do to enlist common opinion on the side of law by the openness and impartiality of its proceedings. In any case, his paper is a valuable guide, and contribution, to the bibliography of the subject.

T. Boston Bruce.

A Practical Treatise on the Criminal Law of Scotland. By J. H. A. Macdonald. Third Edition. Revised and edited by the Author and N. D. Macdonald. Edinburgh: Wm. Green & Sons. 1894. xv and 652 pp.

This treatise, which is from the pen of the present Lord Justice Clerk of Scotland, one of the presidents of the Court of Justiciary, must naturally be regarded as a work of high authority, but unfortunately it is, as it professes to be, no more than a handbook for use in the everyday practice of the Courts. The profession must regret that they have not been favoured with any discussion of legal principles, or any attempt at scientific analysis of the doctrines of the criminal law by one whose long experience, both as a Crown Prosecutor and Justiciary Judge, has given him such exceptional opportunities for writing an institutional treatise.

Mr. Macdonald's book has for a good many years enjoyed a large measure of popularity among practitioners in the North, having been indeed, since the publication of the first edition in 1866, without a rival of its kind. Important alterations have been made in the present edition; the changes effected by the Criminal Procedure (Scotland) Act, 1887, having necessitated the re-writing of a considerable part of the work devoted to Procedure.

To an English lawyer the book will be instructive as showing, in concise form, the rules of criminal law and practice in force in a neighbouring country so intimately connected with his own. He will see that in a great many respects the Scottish system is widely different from the English, and that in some matters it is distinctly preferable. One of the most prominent instances of its superiority is undoubtedly the complete provision that is made for public prosecutions. In Scotland there is practically no such thing as a criminal action at the instance of private individuals; every prosecution has to be conducted by public officials who hold appointments for the purpose. In the Court of Justiciary these officials are the Lord Advocate and Solicitor-General, assisted by four or five Advocates of standing and experience, called Advocates-depute—all of whom are instructed by a Solicitor for the Crown, called Crown Agent. In the Sheriff Courts the duties of prosecution are performed by the Procurators Fiscal, who hold permanent appointments, but are subject to the supervision of the Justiciary officials.

Another point in which the Scottish system seems to be preferable to our own is the provision made for the defence of criminals. There is no such thing as the trial of an undefended prisoner in Scotland except where, as rarely happens, the prisoner positively refuses assistance. The practice is for a certain number of solicitors for the poor to be appointed annually in every local court of jurisdiction by the professional bodies to which they belong, and it is the duty of these persons to plead for poor criminals in the inferior courts, and to instruct counsel for their defence at the Assizes or

the High Court. In England when, as often happens, a prisoner is left without professional assistance, the judge seems to be expected to look after his interests. But this is not satisfactory, as it tends to disturb the judicial balance, and, besides, a judge cannot know what evidence may be available. It is surely not edifying to see a prisoner wrecking, through stupidity or ignorance, what might in skilled hands have turned out to be a perfectly reasonable defence.

The value of the Scottish verdict of 'Not Proven' and the verdict by a majority of the jury instead of a unanimous one, may be open to controversy. We confess that we would prefer a jury of twelve returning its verdict by a majority of three-fourths, rather than the system at present in vogue in either country. Certainly the requirement of a unanimous verdict occasionally leads to great expense, owing to the necessity for new trials. What if there had been one pig-headed juror in the trial of the Tichborne claimant!

One thing, however, seems plain, and that is, that Scotland, like England, is greatly in need of a criminal code. Whatever may be said against the codification of the civil law, the arguments in favour of a criminal code seem invincible. In reading through Mr. Macdonald's book, one sees that there are a considerable number of so-called 'open questions' still existing in the law—doubts whether certain *species facti* constitute a crime or not. Take, for example, theft. For a century or more it has been left an open question whether a wife can steal from her husband. On p. 21 Mr. Macdonald says, 'In one case the accused being the wife of the owner was assoilzied. In another, the objection that the things stolen belonged to the husband of one of the accused, was certified for the opinion of the Court, and no further proceedings took place. But it has not been decided that a wife cannot steal from her husband.' Why should such an important question as this be left unsettled—to be decided perhaps by some judge in some future case according to his particular idiosyncrasy? So also Mr. Macdonald finds it necessary to enumerate in the category of crimes a considerable number of offences which it is almost quite certain have ceased to be crimes, owing to desuetude. For example, would 'Cursing of Parents,' and 'Hamesucken,' be now prosecuted under the old Scots Acts which introduced them? A Crown Prosecutor would probably be ridiculed if he attempted to do so. But why should these matters be left in uncertainty?

The author states without comment that carnal intercourse with a deceased wife's sister is incest, and punishable with either penal servitude or imprisonment. Prior to 1887 it was a capital offence. This may startle some loose moralists south of the Tweed, but we may relieve their minds by asserting that long prior to 1887 the law was in desuetude.

H. G.

A Compendium of Sheriff Law, especially in relation to Writs of Execution. By PHILIP E. MATHER. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1894. 8vo. xlviii and 578 pp. (25*s.*)

MR. MATHER'S book comprises the whole duty of an under-sheriff, and to under-sheriffs it ought to be an indispensable companion.

It purports to be a compendium rather than a treatise, and as such is particularly rich in its tables of cases, of statutes, and of rules and orders. A rather serious omission is the absence of any allusion to Sect. 26 of the Sale of Goods Act, 1893, which deals with the effect of writs of execution, and in some respects alters the existing law. The Common Law rule

correctly stated on p. 81, that 'goods seized under a fi. fa. are bound from *the date of the teste of the writ*, except as against purchasers in market overt,' is scarcely reconcileable with the new enactment, that 'a writ of fi. fa. . . . shall bind the property in the goods . . . from the time when the writ is delivered to the sheriff to be executed.' To make this date perfectly clear, the section of 'The Sale of Goods Act' goes on to provide that it shall be the sheriff's duty to endorse on the back of the writ 'the hour . . . when he received the same,' a provision to which attention should certainly have been called in 'a practical work for under-sheriffs.'

The bulk of Mr. Mather's book necessarily deals with the Law of Execution. It is clear from his preface that the author does not aim at bringing out an original 'treatise' on this subject, like that of Mr. C. J. Edwards, to whom among others his obligations are acknowledged, but rather at providing 'a compendium' from various sources of all the law with which an under-sheriff is likely to be practically concerned.

This object is fully achieved. Besides containing a practical discussion on the law as to the various writs of execution, Mr. Mather's book deals with the duties of sheriffs and under-sheriffs in connexion with Assizes and Sessions, Criminal Execution, and the assessment of Damages and Compensation. Even ceremonial matters such as 'dress' and 'precedence' are adequately discussed by our author. His book brings together within a convenient compass from many other departments of law, a full digest of authorities on every branch of sheriff law: e.g. we do not think there are any cases on the law of execution against companies, to be found in 'Chadwyck-Healey' or 'Buckley,' which are not referred to in the work before us. We heartily commend it, not only to under-sheriffs, but to members of both branches of the profession.

S. H. L.

The Law relating to Losses under a policy of Marine Insurance. By Charles Robert Tyser. London: Stevens & Sons, Lim. 8vo. xvii and 232 pp. (10*s.* 6*d.*)

Mr. Tyser has endeavoured to avert the obvious criticism that specialization may be carried too far if it results in separate works on the Bill of Lading Exceptions, or, as in this case, on Losses under a marine policy, by the warning in his preface that no one who is acquainted with the subject treated of will make such a criticism. With due notice of the risk of writing himself down ignorant before his eyes, the present critic yet ventures to doubt whether it is desirable to treat part of a subject by itself in this way. It seems better for the writer to be compelled to take a wide view of the whole subject; and it is convenient for the reader to have the whole subject in one book, and not to have to search for the law, for instance, as to warranties, in another work. But having made this criticism, we have little but praise for Mr. Tyser's work. It is thorough and careful, and an intelligent treatment of a difficult part of a difficult subject. The author has taken great pains to be short and clear, a task which takes more time than those who have not tried it would think. He clearly defines the terms used, illustrates them by examples, and justifies them in the notes by cases, but does not confuse them by long extracts from judgments inserted in the text. More use might perhaps have been made of the cases on bill of lading exceptions, which are frequently useful on the construction of similar words in the list of perils insured against. For instance, we should expect to find some reference to *Steinman* v. *Angier Line*, '91, 1 Q. B. 619, under

the peril 'thieves.' The short chapter on General Average is perhaps the least satisfactory part of the book, but General Average is a difficult subject, whether in brief or at length. T. E. S.

The Theory and Practice of the Law of Evidence. By WILLIAM WILLS. London: Stevens & Sons, Lim. 1894. 8vo. xliv and 336 pp. (10*s.* 6*d.*)

THERE is hereditary propriety in the appearance of a book on the Law of Evidence by a member of the Wills family, and no member of that family need be ashamed of that which Mr. William Wills now publishes. It is the result of a course of lectures delivered some years ago by the author to the students of the Incorporated Law Society, and though Mr. Wills ascribes to himself the 'twofold aim' of a text-book for students and a handbook for use in practice—'for the ordinary run of *nisi prius* and criminal work'—it is probably rather in the former than in the latter capacity that it is likely to achieve durable success. The introduction contains a good many sound observations, especially where the author points out the facts that, for the reasons he gives, the law of evidence is considerably less strictly construed at *nisi prius* than it used to be, that most of the important decisions on the subject are old, and that, therefore, while it is important in the conduct of litigation to ascertain what is the proper evidence, and provide oneself with it, it is not wise to rely too confidently upon the law of evidence to overcome the strength 'on the merits' of an opponent's case. Mr. Wills conceives that the 'logical order' in arranging the subject is to put the 'burden of proof,' including a brief disquisition on the 'right to begin' and the 'obligation to begin,' first, and proceed afterwards to discuss 'relevant facts,' and the manner of proving relevant facts, which he divides into the perhaps not very elegant titles, '*Media* of proof,' and 'Adduction of evidence' (Is not 'adduction' for 'production' more pedantic than accurate?). We should have said that inasmuch as it does not matter whether the Court will or will not take judicial notice of a fact, or whether or not there is a presumption concerning it, until the fact has been ascertained to be relevant, the 'burden of proof' came more naturally and quite as logically, after relevance, as part of the manner of proof; but the question is of little importance, and the three chapters included under the heading here put first are not long. The work is, in point of arrangement, essentially in the nature of a digest, and of the school of which The Digest of the Law of Evidence is the earliest noteworthy example, but it is a digest clothed with comment for the benefit of the student. Mr. Wills incidentally observes that in an opening speech 'it is necessary not to present the important facts in too bare a manner, if they are to be followed with ease by the listeners,' and in his book, as doubtless in his lectures, he has been mindful of his own precept. Throughout the volume his references to underlying principles are judicious, and show a real understanding of the subject. It is decidedly a meritorious work.

Conveyancing and Settled Land Acts, and some other recent Acts affecting Conveyancing, with Commentaries. By H. J. HOOD and H. W. CHALLIS. Fourth Edition, by the Authors, assisted by H. A. COLMORE DUNN. London: Reeves & Turner. 1895. 8vo. xliii and 516 pp.

IN our review of the last edition of this book we stated that it had attained a high standard of excellence. We are pleased to see that the

public agrees with us, and that a new edition is required. If we may judge by odd blunders that we meet, not only in reported cases, but in private practice, the knowledge of the law of real property is less widely spread than it was some twenty years ago. One of the advantages of the book now before us is that real property law is stated with great correctness. There are a few matters capable of controversy where the authors do not discuss the opinions with which they do not concur, ex. gr. 'descendible estates,' p. 21; 'leasehold tenure,' p. 9. We can hardly blame them for taking this course, as, if they had acted otherwise, they would have added largely to the bulk of the book, and probably those few of their readers who would be willing to consider matters of this nature already know where they can find them discussed.

The question whether the decision of Stirling J. in *Ailesbury* v. *Iveagh*, '93, 2 Ch. 347, is correct may possibly be of very great importance with regard to the incidence of Estate Duty, and we therefore regret that the authors have not discussed it at length.

The Acts commented on are—The Vendor and Purchaser Act, 1874; The Conveyancing Acts, 1881, 1882, and 1892; The Settled Land Acts, 1882, 1884, 1887, and 1890; The Trustee Acts, 1888, 1893, and 1894; The Married Women's Property Acts, 1882, 1884, and 1893; and The Land Charges Regulation and Searches Act, 1888. As far as we have been able to ascertain all the cases decided on these Acts are mentioned. The table of cases contains references to all the reports, and there is a very good index.

In conclusion, we urge on our readers to buy this book and to judge for themselves whether our praise is not well founded.

An Outline of English Local Government. By EDWARD JENKS. London: Methuen & Co. 1894. 12mo. 229 pp.

THE aim of this book is stated to be to give to the non-professional citizen some reasonably coherent ideas concerning the mass of local government machinery. To do this successfully within the space of 229 small pages is a task of great difficulty; and the author may be congratulated on having reduced into a clear and readable form the chaos of statutes, decisions, and orders with which he has had to deal.

The only part of the work which we have difficulty in understanding is the introductory chapter, in which, after a not very successful attempt to distinguish central from local government, five points are stated 'to serve as a kind of life-saving apparatus after the great plunge.' We are told that in new countries the local organs are a creation of and subordinate to the central government, whereas in an old country like England the central government is the creature of and historically subordinate to the local organs. The first part of this proposition may or may not be true, but surely the second part is not true as regards England. We should have liked to hear William the Conqueror's or Henry II's answer to any one who dared suggest it to him. No doubt townships, hundreds, and shires are older than Parliament, but what have these to do with modern local government? The hundred as a unit of government has long been dead, so has the township, except in a few places where it survives as a highway parish. The shire indeed exists as the county, but county government by Quarter Sessions, County Council, and Standing Joint Committee is the creation of statute, and the sheriff represents not local but central government. So, too, Vestries (as regards their civil powers at least), Overseers, Parish and

District Councils, and Guardians of the Poor, all emanate from Parliament. In the liability of the highway parish to repair its highways we have some trace of the Common Law, but that is a case of subordination of local to central government. It is the Crown that indicts the inhabitants for non-repair. Names and areas may be ancient, but local government is almost entirely statutory, and in large part dates back no further than this century.

The attempt to find in archaic institutions the key to our modern system leads to the strange device of treating every one of the new governmental areas as analogues of one of the old divisions. Thus the Petty Sessional Division, County Court District, Union, Sanitary District and Highway District are treated of under 'the Hundred and its Analogues.' The analogy, however, is very superficial. In mere size the Union may often resemble the Hundred; but there the analogy stops. Fainter still is the analogy of an ordinary Urban District with a Hundred.

The classification of the subject wholly by areas leads to confusion and repetition in dealing with the matters of government. Thus we nowhere get a continuous account of the police system, or of the powers of Justices, or of sanitary matters, and of the relationship one to another of the various bodies having control of each of these matters. The powers of Justices in Petty Session is the subject of Chapter V, whilst Quarter Sessions and Justices out of Session are treated of in the chapters on the County and the Borough.

Mr. Jenks assures his readers that he has 'never been guilty of the rashness of making a statement without verifying it at the fountain-head.' In view of the many mistakes in detail that we have found throughout the book, we have difficulty in accepting the assurance. But, assuming that there is authority for every statement, it is tantalizing to have no means of discovering those authorities. We should like, for instance, to know when it was decided or enacted that a chairman at Petty Sessions has a casting vote. Has *Reg.* v. *Ashplant* (52 J. P. 474) been overruled? Again, it is said that the Local Government Act, 1894, transferred from Justices out of Session to 'the Sanitary Authority' the power 'to regulate fairs.' The transfer is in fact to District Councils; and the power transferred is that of making a representation to the Home Secretary that it is desirable to abolish, or change the date of, a fair. Surely the owner or lord of the fair alone 'regulates' it.

These are but samples; and though there are many like them, nevertheless the book contains much that is good and useful for students desirous of a general view of our institutions. Yet for these, and still more for lawyers, it would be much more useful if the author had given references to his authorities. To the student references to the leading text-books are invaluable for guiding him to the sources of fuller information; to the lawyer no book can be of much use unless he can thereby find his way to the statutes and reported cases.

An Outline of Local Government and Local Taxation in England and Wales (excluding London). By R. S. Wright and Henry Hobhouse. Second Edition, by Henry Hobhouse, M.P., and E. L. Fanshawe. London: Sweet & Maxwell, and P. S. King & Son. 1894. La. 8vo. xxii and 152 pp. (*7s. 6d.*)

We cordially welcome a second edition of this most excellent summary of Local Government law. The first edition, by Mr. Justice Wright and

Mr. Hobhouse, appeared in 1884. Since that time there have been passed the Local Government Acts of 1888 and 1894, one of the objects of which was the simplification of our institutions. This process has consisted in creating several new bodies, such as County Councils, Standing Joint Committees, Parish Councils and Meetings, and new areas called administrative counties and county boroughs, whilst keeping alive all the old bodies and areas except some of the highway authorities and districts. These complicated changes have necessitated the re-writing of several chapters, and the new work seems to be quite up to the high level of the old in lucidity, terseness, and accuracy.

The book is divided into three parts. In the first the area, organization, and purpose of each unit of local government is clearly explained. Part II, dealing with matters of local administration, contains admirable summaries of such branches of the law as those touching poor relief, public health, highways, licensing, and many others. The third part consists of a neat account of local finance, together with tables showing the local indebtedness and taxation of the country.

For a book dealing with so large a mass of complicated detail it is wonderfully free from mistakes. The only noteworthy inaccuracies we have been able to find are the following:—On page 2 it is said that the Parish Meeting chooses its own chairman. This is true only of parishes which have not Parish Councils. In those which have Councils, the chairman of the Council is chairman of the Parish Meeting, unless he is a candidate for election as a Parish Councillor at that meeting.

The qualification of Borough Councillors is stated more accurately than it was in the first edition, but still not quite correctly. For it is not said that in order to be on the separate non-resident list, a person must be qualified as a burgess in every respect except that of residence.

On page 22 it is stated that 'the mayor and last ex-mayor are justices for the borough.' This is a misleading paraphrase of s. 155 of the Municipal Corporations Act, 1882, which enacts that 'the mayor shall by virtue of his office be a justice for the borough, and shall, unless disqualified, continue to be such a justice during the year next after he ceases to be mayor.'

We regret that the authors have not given fuller references to authorities. As a rule the statutes are given in the margin, but not the sections, and important amending Acts are sometimes omitted—such as the County Electors Act, 1888, amending the Municipal Corporations Act, 1882, s. 9. Cases are not often quoted, and where they are, the references are sometimes inadequate—such as '*Thomas* v. *Hill*, 1893, Q.B. App. 565;' '*Etherley* v. *Auckland*, C.A. Nov. 1893.' Both of these cases are reported in the Law Reports, and the volumes and pages might easily have been given.

The Law of Ejectment or Recovery of Possession of Land. By John Herbert Williams and Walter Baldwyn Yates. London: Sweet & Maxwell, Lim. 8vo. lxix and 404 pp. (16*s.*)

For the man who cannot find a new subject, the next best thing is a subject upon which no book has been written for forty years past. This is what Mr. Williams and Mr. Yates have found in 'Ejectment,' the old-fashioned phrase which prevails still despite the Rules of Court. They have discussed their subject succinctly and yet fully: their power of stating their matter clearly and arranging it well is remarkable. Not the least useful part of their neat book will be found in the Appendix of Statutes, beginning with Richard II and ending with the Local Government Act of last session,

which covers nearly ninety pages, about a quarter of the substantive work, The writers refer to many of the cases which have been decided upon a difficult and intimate branch of the law. But we are surprised not to find on page 94 the well-known case of *Powys* v. *Blagrave* (4 De G. M. & G. 448), deciding that an equitable tenant for life is not responsible for permissive waste. And when the table gives the multiplied references to various reports, it might also give, not only the dates of the cases, but also their full names. In a book which deals with a branch of the great subject 'Landlord and Tenant,' Doe is not, standing alone, a distinctive name for a plaintiff. These, however, are small things, which may serve as reminders for a second edition. Hitherto we have been accustomed to turn to 'Foa' upon a question of tenancy. Now when we want to go further, and delve into a point of ejectment, we shall turn to 'Williams and Yates,' and it is certain that we shall not fare worse.

Rogers on Elections. Vol. III. *Municipal Elections and Petitions.* Seventeenth Edition. By S. H. Day. London: Stevens & Sons, Lim. 8vo. 1894. xxvii and 780 pp. (21*s.*)

This volume is a standard authority on a subject of daily increasing importance. The Local Government Act, 1894, has established municipal or quasi-municipal bodies throughout the land, and has materially altered the law as to London.

Under these circumstances a new edition of this volume was a necessity, and the thanks of the public, and especially of local officials and candidates, are due to the Editor.

Perplexing everywhere, the law on the subject is now especially so in London, where it is full of pitfalls. Even persons of experience may be excused for not always bearing in mind the distinction between the Vestries mentioned respectively in Schedules A and B to the Metropolis Management Act, 1855; yet the distinction between them is great, the former being themselves the Boards of Works for their districts, while the latter are grouped together so as to form a separate Board for two or more parishes. Vestries of the former class elect for a year a chairman who is to be *ex officio* a Justice of the Peace, while the latter have no such privilege.

The subject of election petitions forms an important part of the volume. If the curious reader wishes to see some instances of human error, let him turn to the examples of doubtful ballot papers given at pages 167–172. These reduced facsimiles of original papers actually used at the Cirencester election are as amusing as useful.

Some idea of the importance to the legal profession of the subject of this work may be gathered from the fact, that out of some twenty cases reported in the January number of the Law Reports (Queen's Bench Division), more than half deal more or less with municipal affairs. In fact, nowadays, only public bodies appear to have the courage, or we might perhaps say the funds, for serious litigation.

Natural Rights: a criticism of some political and ethical conceptions. By David S. Ritchie. London: Swan Sonnenschein & Co. New York: Macmillan & Co. La. 8vo. xvi and 304 pp.

Law in a Free State. By Wordsworth Donisthorpe. London: Macmillan & Co. 8vo. xii and 312 pp.

Neither of these books can be adequately criticized in a review that has to put law as a special science, not the philosophy of law as a branch of

political science, in the first line. Mr. Ritchie stands for a philosophy of the State frankly based on experience, but inclining on the whole to conclusions often associated with speculative socialism. Mr. Donisthorpe stands for an extreme and eccentric individualism, and professes to stand on experience, but he is really as much entangled in *a priori* conceptions of natural rights as any professor of the many faiths that have vouched the Law of Nature to warranty, commonly with the result that the said law, though solemnly called, maketh default.

Mr. Ritchie's dissection of various systems of Natural Rights and their fallacies is not altogether systematic, but it is pointed, stimulating, and generally sound. We should conceive that young students of political theories would find it excellent for clearing the head. Mr. Ritchie is careful to show that 'all abstract theories about human society admit of divergent and conflicting application,' and other such matters which, if not new in themselves, are in constant need of fresh re-statement. He rightly points out that Benthamism, with all its specious show of common sense, is really as abstract as any other universal theory. One of the best chapters is that which deals with 'liberty of association;' Mr. Ritchie shows how this liberty may become a tyranny from which it is the duty of the State to deliver the citizen.

As to Mr. Donisthorpe's book, it is clever, desultory, paradoxical, unequal, sometimes startling, never dull, and (to us at least) never convincing. It contains a serious proposal for the reform of the Adulteration Acts by means of a stringent implied warranty, to be available for a disappointed purchaser without rejecting the goods, and certain proposals for the reform of marriage —let us say back towards Roman republican law—which Mr. Donisthorpe himself cannot expect to be taken seriously by this generation. The student who has assimilated Mr. Ritchie's dialectic will probably rise from Mr. Donisthorpe's book having discovered for himself that individualism is only one kind of *Naturrecht*, and not the best.

The Study of Cases. By EUGENE WAMBAUGH. Second Edition. Boston, Mass.: Little, Brown & Co. 1894. 8vo. xviii and 333 pp. ($2.50 net.)

THIS work (of which the first edition was unluckily not brought to our notice) aims at teaching students the methods by which lawyers determine the weight and pertinence of reported cases. The knowledge a person accustomed to reading cases must have attained is here for the first time, so far as we know, stated in a theoretical form as a guide to the beginner. In treating of the authority of cases the author makes use of a new terminology. A case, he says, is of 'imperative' authority when it would be followed by a subordinate court without hesitation or question. Beyond those subordinate courts the decision is merely of 'persuasive' authority, while 'quasi-authoritative' is the term applied to *dicta* which have weight but not authority, and which will probably, though not necessarily, be followed.

Four keys are given by which the student may learn to discover the 'doctrine of a case.' The first is that the Court must decide the very case before it, and nothing else. The second is that the Court must decide the case in accordance with a general doctrine; hence the necessity for eliminating unessential circumstances. The proposition evolved after such elimination must be a general rule, without which the case must have been decided otherwise. So far as the opinion of the Court goes beyond

a statement of the proposition of law necessarily involved in the case, the words contained in the opinion are merely *dicta*. Thus the third principle is that the words of the Court are not necessarily the doctrine of the case. Fourthly, the doctrine of the case must be a doctrine that is in the mind of the Court. What makes decisions of value as precedents is the fact that they are based upon reasoning, not upon chance. If it can be shown that a particular point was absent from the consideration of the Court, then as to that point the decision is of no authority whatever.

A dissenting judgment seems, in Mr. Wambaugh's view, rather to strengthen the decision of the majority, as showing that the case was thoroughly debated. We venture to think that something depends on the person of the dissenting judge. Certainly we have read dissenting opinions of Field J. which convinced us that he was right against the majority of the Supreme Court of the United States. It is said again, that a decision given as *per Curiam* 'does not receive as high respect as an opinion vouched for by some one judge, and adopted by the Court.' This is not so in English practice, where a judgment of the Court is prepared by one judge and settled in consultation with his brethren, and usually, though not always (see 7 App. Ca. at p. 360, where Lord Blackburn avows himself the author of a notable judgment delivered in the Exchequer Chamber by Mellor J.) delivered by the judge who prepared it.

There is a short chapter entitled 'How to write a head-note,' which may be studied with profit by young reporters, and will be found interesting even by experienced ones.

To the best of our knowledge, only one book in the literature of the Common Law has made any serious endeavour to deal with these topics, or some of them, before Mr. Wambaugh's. We mean Ram on Legal Judgment, a book of considerable merit, but more than half a century old, and never re-edited. The fact that a second edition of the present work is demanded within three years is enough to show that Mr. Wambaugh has filled a real gap in our provision of students' books: and we think he has filled it very well.

Ruling Cases. Edited by R. Campbell. With American Notes by Irving Browne. Vol. II. Act—Ame. London: Stevens & Sons, Lim.; Boston, Mass.: The Boston Book Co. 1894. La. 8vo. xxx and 791 pp. (25*s.* net.)

The second volume of Ruling Cases enunciates clearly and well the general principles of law relating to the subjects included. The head of 'Administration' appears to us to be particularly well dealt with. The treatment of it is comprehensive and likely to be of practical use to the working barrister. How far it can be useful to treat the title of 'Air' apart from 'Light' and from the wider and comprehensive titles of 'Nuisance' and 'Prescription' may be open to question, but the object is expressed to be to discuss the right to air as a separate subject of enjoyment, and, in so far as that is established by the ruling cases referred to on the subject, it is a novel and, maybe, a convenient departure from the more ordinary system of arrangement.

We note that *Hollins* v. *Fowler*, which is the leading modern case on Conversion, is given under the title of 'Agency.' There is certainly no objection to this; but at the same time it appears to us that it will be necessary to include it also under the title of 'Conversion,' which would certainly be incomplete without it. Such, however, are the inevitable

difficulties of combining a selection of leading cases with a digest. We may add that the objection raised by us in a criticism on the first volume, that the American ruling cases have not been set out at length, is, as far as we can judge from the American point of view, answered and removed by the preface to the present volume, where it is stated that, for American purposes, a selection is already made in the American reports there mentioned, to which there are references in all the American notes in this series. But this is no answer to the English lawyer who wishes for specimens of the best American authorities. 'Ruling Cases' will, no doubt, be of great service to men unable to provide themselves with large libraries.

The Merchant Shipping Act, 1894. By THOMAS EDWARD SCRUTTON. London: Wm. Clowes & Sons, Lim. 1894. 8vo. xlii and 753 pp. (30*s.*)

THIS work on the new Merchant Shipping Act is the first in the field that can be called a complete handbook to the Act. It has a respectable table of cases, smaller in size than we should have expected, but nevertheless, so far as we have tested it, complete, and containing all or nearly all the cases which throw light upon the construction of this intricate and lengthy Act. *Burrell* v. *Simpson*, 4 Sess. Ca. 4th ser. 177, is not amongst them, perhaps because it is a Scotch case; nor *Glyn, Mills & Co.* v. *East & West India Dock Co.* 7 App. Ca. 592, which throws some light upon secs. 492–494.

Mr. Scrutton has a terse and forcible method of explaining the effect of a decision; of this his note upon the *Hankow*, 4 P. D. 197 (p. 478), is an example. He also has strong views, which he expresses in similar language, upon the general character of the new Act as a specimen of modern legislation. The draftsman has not acquired 'a very clear grasp of the Acts' codified. The grammar is occasionally 'bad, even for an Act of Parliament.' The law relating to fishing-boats 'is not adapted to the understanding of fishermen.' The pilotage law was 'a disgrace to any civilized system of jurisprudence, and this Act has made it worse.' With the last criticism we entirely agree. It is impossible to ascertain from the pilotage Acts whether pilotage is made compulsory for the sake of the ships or for the sake of the pilots; and continual legislation upon a subject as to which the Legislature does not know its own mind is likely to result in absurdities. The upshot of Mr. Scrutton's criticism of the present state of Merchant Shipping law is that codification leads to amendment; perhaps this is one of its uses.

An important part of such a work as this is to give an easy mode of reference to the corresponding enactments in repealed statutes. This Mr. Scrutton does by appending to the marginal notes of the existing Act a reference to the Act and section or Order in Council which is reproduced. This serves the purpose; but a distinction, in type or otherwise, should have been made between the marginal notes themselves and the editor's references. Some of the Appendices seem wanting in notes. For instance, Article 10 of the Collision Regulations requires explanation by the light of subsequent Orders in Council. It would be too much to expect all the cases decided upon these Regulations to be cited, but the Regulations are scarcely intelligible without some of them; and none are given. On the other hand the cross-references in the notes to the body of the Act are very full. The value of the book can only be discovered by continual use. So far as we have tested it, Mr. Scrutton's work appears to have been well and thoroughly done. His printer should not, however, have altered the name of a great judge (p. 320) to Willis J.

The Merchant Shipping Act, 1894. By J. D. White. London: Eyre & Spottiswoode. 1894. 8vo. xvi and 628 pp. (*7s. 6d.*)

This is the third book on the Merchant Shipping Act, 1894, that has come to our hands. It is small in bulk, though not in the number of its pages. There are notes following the sections to which they relate, referring to cases illustrating the text of the Act, but not much in the way of cross-references; nor do the notes indicate where the old law reproduced in the several sections of the new Act is to be found. The Index is somewhat scanty. Though not exhaustive from the point of view of the practitioner, the book probably contains all that business men and many lawyers require. The table of cases runs to fourteen pages and gives references to all the Reports.

A Treatise on the Law of Charterparties. By Eugene Leggett. London: Stevens & Sons, Lim.; Calcutta and Bombay: Thacker & Co. 1894. 8vo. xlix, 662 and lxiii pp. (*25s.*)

Mr. Leggett's industry in India has now added to the 800 and more pages he has devoted to Bills of Lading, 750 of the same description on Charterparties. If these very closely-allied documents cannot be dealt with satisfactorily in less than 1600 pages, we shall all have to extend our legal libraries very considerably, and re-write most of our text-books. The work before us is on the same lines as the work on Bills of Lading previously reviewed in these pages (L. Q. R. x. 89). The author still thinks 'Part I. The nature of a charterparty, and its legal incidents; Part II. The legal effect of the clauses and stipulations in the charterparty; Part III. Exceptions,' a scientific and convenient division. He still cites judgments at great length and without much appreciation of their meaning, stringing them together with inadequate general propositions. He still suffers from incapacity to frame a short or intelligible definition; witness the twenty-four lines on page 2, which are by courtesy to be considered a definition of a charterparty, and compare them with the two short statutory definitions on the opposite page. When there is a difficulty not apparent on the face of the reports he usually overlooks it. Thus on page 508, the short and simple statement is made that in lay days and demurrage days (the passage appears to apply to either, though the author does not seem to have appreciated that they might be different) a part of a day counts as a whole day. The Court of Appeal has just held in *The Katie* ('95, P. 56) that this is true for demurrage days, but not for lay days, in the absence of agreement, and the authorities before this had left the point open.

We should like to hear Mr. Leggett's views of what was supplied by his 1600 pages which was not given more thoroughly and usefully in say the 700 pages of Mr. Carver's 'Carriage by Sea.' The work has apparently been carelessly revised for press; at least we hope that this is the explanation of the passage on p. 634, making Willes J. and A. L. Smith J. members of the same Divisional Court; of several wrong references in the index; of the failure to note that *Laurie* v. *Douglas*, 15 M. & W. 746, has been doubted if not overruled in *The Accomac* (1890) 15 P. D. 208; and of the mysterious sentence on p. 524, beginning 'In bags of linseed, the Court held . . . .' More serious faults appear to be the very scanty mention of the statutory powers of the shipowner to preserve his lien under the Act of 1862, the importance of which has just been illustrated by the decision of the House of Lords in December, 1894, in *White* v. *Furness, Withy & Co.* ('95, A. C. 40). We are unable to commend the book as an example to young authors.

The Building Societies Acts, 1836, 1874, 1875, 1884, 1894. By J. Ritchie Macoun. London: Sweet & Maxwell, Lim. 1894. 8vo. xxviii and 183 pp. (5*s.*)

A new Act means new law-books, one or many. The Building Societies Act of last session has brought Mr. Macoun to the fore with a very useful manual which brings the six existing Acts into convenient focus. His plan is to cut up each Act into sections and paste all the sections together in what he conceives to be their proper order. We cannot altogether admire this method of scissordom, but granting the wisdom of Mr. Macoun's policy, his execution is admirable. It would have been better if he had given a full table of contents, which would have gone far to illustrate his arrangement of sections. And the effect produced by reproducing the preambles and initial sections of the six Acts consecutively is certainly peculiar. The work, however, which Mr. Macoun has done is thoroughly painstaking and good. Every case is cited, and fully cited. And the introduction which Mr. Macoun has written upon the development of building societies is admirably lucid and pertinent. The book will unquestionably be useful alike to lawyers and to laymen. It will be particularly well placed in the hands of the officials who govern building societies. For it is upon their fulfilling their trusts conscientiously that the welfare of a society depends. It is when they ignore or betray their trusteeship that failure or disaster comes. With Mr. Macoun's help they may avoid many legal difficulties, and see at any rate when there is occasion to ask for legal advice.

The Law relating to Children and Young Persons. By Joseph Bridges Matthews. London: Sweet & Maxwell. 1895. 8vo. xvii and 400 pp. (10*s.* 6*d.*)

The author has performed a useful task in bringing together in the present volume the various statutes and portions of statutes relating to children and young persons. The Prevention of Cruelty to Children Act of 1894 is treated as the principal enactment in this branch of the law, and is annotated chiefly by references to other relevant Acts; but apart from this, little attempt is made to analyze or group the different statutes, or to deal critically with such difficulties as the text presents. Moreover, in raising so many queries to which no answers are vouchsafed (e.g. on p. 127), the author does not add much to the elucidation of obscure points of law. The book excludes much that relates to 'Infants' in the technical sense of the word, and it was no doubt a wise decision to avoid all comment on the Infants Relief Act, 1874, which applies mainly to children of a larger growth, rather than deal with it inadequately. To those persons who are interested in setting in motion the laws for the protection of children and young persons generally, even more than to the practitioner, the present handy volume, which contains a mass of information drawn from the most various sources, will be of considerable service. The case of *Scarman* v. *Castell* (1 Esp. 270) mentioned at page 80, fails to appear in the list of cases cited.

The Law of Eminent Domain in the United States. By Carman F. Randolph. Boston: Little, Brown & Co. 1894. La. 8vo. cxxv and 462 pp.

This latest contribution to the law of Eminent Domain in the United States is a striking illustration of the growing tendency to make text-books

mere digests of all reported cases without regard to the merit or authority of the decisions. There are about four thousand citations of cases in the four hundred pages of text, though some of them are cited more than once. The work would be more valuable if it contained a better statement of the well-considered and authoritative decisions.

The distinction between the police power and the right of eminent domain is well stated and illustrated. The recent decisions are carefully collected and their effect stated with substantial accuracy. The book is a useful addition to the previous discussions of a branch of the law which has become of very great practical importance in the United States.

We have also received:—

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, D.C.L. Seventh Edition. Oxford: Clarendon Press. 8vo. xx and 402 pp. (10*s.* 6*d.*) —Prof. Holland has so often revised the substance of this standard work that he was well entitled to confine himself this time, as the brevity of the new preface suggests that he has, to 'posting up.' We should almost prefer the book to be called 'Institutes of Law,' for it deserves that title better than any modern book we know. Criticism is hardly called for, but we may point out that Mr. W. A. Hunter was not at all the first writer, though he was the first in England after Maine had made Savigny's historical theory of the Stipulation popular, to show cause against that theory (p. 244); and that the language used about warranties on p. 210, though a trained lawyer will read it as qualified by the context, might possibly lead a beginner to think that the operation of a warranty *ex contractu* has something to do with the warrantor's state of good faith or otherwise.

A Digest of the Criminal Law. By the late SIR JAMES FITZJAMES STEPHEN. Fifth Edition. By SIR HERBERT STEPHEN and H. L. STEPHEN. London: Macmillan & Co. 1894. 8vo. xlvii and 488 pp. (16*s.*)—It was time that Sir James Stephen's Digest of the Criminal Law, which may now be called the classical text-book of the subject, should be brought down to date. The eminent author's sons have done this with all due piety and discretion. They have probably been wise in not touching the notes in the appendix. But perhaps a few references to later literature, besides the necessary decisions and statutes, might have been added. For example, there has been some discussion, both judicial and extra-judicial, of what is meant by 'possession' in English law, since the note on 'Possession in relation to the law of larceny' was last revised by Sir James Stephen.

Commentaries on the Law of Persons and Personal Property: being an introduction to the study of Contracts. By THEODORE W. DWIGHT. Edited by EDWARD F. DWIGHT. Boston: Little, Brown & Co. 1894. La. 8vo. lxii and 748 pp.—We have not been able to make an adequate examination of this posthumous monument of the late Prof. Dwight's labours. It obviously contains much excellent learning, and English lawyers who have occasion to satisfy themselves how far doctrines of the Common Law continue to be received in the United States in the same sense as here may well find it of practical use. There are signs of the author's last revision not having been given, and we think the editor's natural piety has made him a little too timid. He might have safely ventured to put the United States Copyright Act of 1891 into the text, rather than stow it away in a foot-note. The title has to be read very literally, for the subject of Contracts is not reached.

Footpaths and Commons, and Parish and District Councils. By Sir Robert Hunter. London: Cassell & Co. 1895. 8vo. 32 pp.—We hope this little handbook will be widely known and used. Public rights have often been lost for want of taking the proper steps in time, and in the absence of competent advice nothing is easier than to turn a good case of this kind into a bad one by injudicious proceedings. There could not be a better qualified guide to the subject than Sir Robert Hunter. One minute criticism: in citing the Law Reports from 1875 onwards it is wrong to prefix 'L. R.'

The Student's Guide to the Bar. By W. W. Rouse Ball. Sixth Edition. By John P. Bate. London: Macmillan & Co. 1895. Sm. 8vo. 60 pp. (*2s. 6d.*)—This is a sensible and practical handbook, already well tested. The only criticism that occurs to us is that now and then it seems to be addressed almost exclusively to University men. Surely the Inns of Court student who has not been at any of the Universities, and to whom explanations of the Inns and their ways by the analogy of colleges is only *obscurum per obscurius*, is of the kind most in need of guidance.

Every Man's own Lawyer. By a Barrister. Thirty-second Edition. London: Crosby Lockwood & Son. 1895. 8vo. xvi and 736 pp. (*6s. 8d.*)—This book aims at being 'an absolute necessity for every Englishman who desires to have some acquaintance with the laws of his country'; and this edition has the new feature of a dictionary of legal terms. The definitions may be found in the main sufficient for the wants of lay people, but such as those of 'civil law,' 'consideration,' 'damage feasant' (too narrow), 'fealty' (not confined to freeholders as supposed), 'folk-land' (out of date since Vinogradoff restored Spelman's explanation), 'manor' (freehold tenants ignored), 'peine forte et dure' (quite inaccurate), 'seisin,' 'socage' (not distinguished from military tenure), 'trespass' (much too wide), 'wapentake' (no more 'a term for the hundred' than Yorkshire is a term for Devonshire), will not satisfy lawyers and scholars. Of the general utility of such a book lawyers are perhaps the worst possible judges. We observe, however, that recent cases have been noted up to an extent, and in a manner, that seem at first sight more appropriate to a text-book for law students than to a popular exposition.

Briefless Ballads and Legal Lyrics. Second Series. By James Williams. London: A. & C. Black. 1895. 8vo. 96 pp.—We have no space for desipience in this Review, though we count it an excellent thing in its place; and therefore we can only say 'privily' to our learned readers (as the judges are now and then reported in the Year Books to have relieved their feelings in asides to counsel) that Mr. Williams's trifles will be found melodious and entertaining. But we must point out that John Doe was not usually the casual ejector in an action of ejectment. That even more shadowy person dropped out of the action at an early stage to make way for the real defendant. Also it is no more the custom of judges to spit in (or indeed out of) court in Massachusetts than in England (see p. 77).

Riccardo Malombra, professore nello studio di Padova, consultore di stato in Venezia. Ricerche di Enrico Besta, studente nella Università di Padova. Venezia, 1894. La. 8vo. 184 pp.—A work of academic piety, being a monograph on the fourteenth-century publicist Malombra, sometime a professor at the writer's university. Several of Malombra's opinions are set out, and ought to be interesting to students of mediaeval civil law. The performance has every appearance of being competent and scholarly.

Ruling Cases. Edited by R. CAMPBELL. Vol. III. Ancient Light—Banker. London: Stevens & Sons, Lim.; Boston, Mass.: The Boston Book Co. 1895. La. 8vo. xxvii and 779 pp. (25*s.* net.)

A Collection of Statutes relating to Criminal Law. Reprinted from the fifth edition (by J. M. LELY) of Chitty's *Statutes of Practical Utility.* With an Introduction and Index by W. F. CRAIES. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1894. La. 8vo. xxxvi, 429 and 33 pp.

Eight Hours for Work. By JOHN RAE. London: Macmillan & Co. 1894. 8vo. xii and 340 pp. (4*s.* 6*d.*)

The Unemployed. By GEOFFREY DRAGE. London: Macmillan & Co. 1894. 8vo. xiv and 277 pp. (3*s.* 6*d.*)

A Handy Book of the Labour Laws. By GEORGE HOWELL, M.P. Third Edition, revised. London: Macmillan & Co. 1895. 8vo. xii and 338 pp.

The Merchant Shipping Act, 1894, with an Introduction, Notes, including all cases decided under the former Enactments consolidated in this Act, a comparative Table of Sections of the former and present Acts, an Appendix of Rules, Regulations, Forms, &c., and a copious Index. By ROBERT TEMPERLEY. London: Stevens & Sons, Lim. 1895. La. 8vo. lxxx and 714 pp. (25*s.*)

Bateman's Law of Auctions. Seventh Edition. By PATRICK F. EVANS. London: Sweet & Maxwell, Lim.; F. P. Wilson. 1895. 12mo. xl and 595 pp. (12*s.*)

A Dictionary of Crimes and Offences according to the Law of Scotland. By JOHN W. ANGUS. Revised by R. B. SHEARER. Edinburgh: W. Green & Sons. 1895. 12mo. 538 pp.

The Law of Torts. By SIR FREDERICK POLLOCK. Fourth Edition. London: Stevens & Sons, Lim. 1895. 8vo. xl and 636 pp. (21*s.*)

La Codification du droit international de la faillite. Par D. JOSEPHUS JITTA. La Haye: Belinfante Frères. 1895. La. 8vo. xvi and 342 pp.

The Law relating to Income Tax. By ARTHUR ROBINSON. London: Stevens & Sons, Lim. La. 8vo. xlix and 508 pp. (21*s.*)

The Annual Digest, 1894. By JOHN MEWS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1895. La. 8vo. xl and 17 pp., 352 columns. (15*s.*)

The Merchant Shipping Act, 1894 . . . being a supplement to Kay's *Law relating to Shipmasters and Seamen.* By the Hon. J. W. MANSFIELD and G. W. DUNCAN. London: Stephens & Haynes. 1895. La. 8vo. viii and 415 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.